

**Shari'ah Legal Practice
In Nigeria
*1956-1983***

MUSA ALI AJETUNMOBI

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SHARI^cAH LEGAL PRACTICE

In Nigeria 1956-1983

MUSA ALI AJETUNMOBI



KWARA STATE UNIVERSITY PRESS

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Foreword

The *Shari'ah* is a legal system which has been both formally and informally applicable from the inception of the Sokoto Caliphate – in the courts of the Emirs, under the dispensation of an Alkali in the established courts and by the learned scholars amongst their followers – throughout what is today known as Northern Nigeria. Its fortune has seen ups and downs over the years. In the heyday of the Caliphal administration, it was unhindered in its scope save for the mediating influence of customary practices. At inception, the British colonial administration accommodated the reach and scope of its application but gradually begun the process of curtailing its holistic applicability through ingenious devices. For instance, Islamic law was treated as 'native law and custom' which was subject to the repugnancy and incompatibility tests. These tests introduced wholly new and extraneous yardsticks for determining whether or not a principle of Islamic law, which has otherwise been proven to exist, may be applied to a case before an Alkali. This has put judicial officers under great strains and strictures which often led to their verdicts being overturned on appeal by reference to criteria that were extraneous or alien to it. Over the period of half a century, this led to its consignment to the sphere of 'personal law'. Its displacement from the penal domain was attained on the eve of the grant of independence with the adoption by the Northern Region of Nigeria of the Penal Code.

It is against this abbreviated historical background that Ajetunmobi's work, which was originally a doctoral dissertation, must be situated. Before we do that one must point out that other works belonging to the same subject matter have preceded his. Of significance are similar, albeit unpublished, works by the late Dr Suleman Kumo, Prof. Ahmed Beita Yusuf and Key and Richardson's work on the Area Courts which have enriched our understanding of the phenomenon. While Kumo dealt with the history of *Shari'ah* or Alkali courts and their transformation under colonial influence, Beita's, being a sociological work, situated the application of Islamic law in the context of changes taking place in the society. Richardson's

is of course a textbook which has sought to introduce both scholars and students to a study of the hierarchy, jurisdiction and types of local courts in the North.

For the first time, Ajetunmobi, albeit posthumously, offers us the privilege to hear the stories of Kumo and Beita in his *Shari'ah Legal Practice in Nigeria 1956–1983*.

The book has provided a very rich historical background which has captured the developments I referred to in my opening remarks above. It also has interjected a brief account of the introduction of Islam in Nigeria, though it avoided the details of how the *Shari'ah* courts developed at inception. The author has laboured admirably to provide a sketch of the hierarchy of native courts which dispensed the application of *Shari'ah* both at lower and appellate levels.

The author's attempt to discuss the relation of lower courts to superior courts of records, such as the Court of Appeal and the Supreme Court, is rather fleeting not for want of efforts but perhaps owing to dearth of case-law and the perfunctory relationship existing between these courts. Despite this, he has paid due regard to two notorious cases which have illustrated the point: *Karimatu v Paiko* and *Ado v Dije*. There is commendable attempt to give a statistical account of the extent of Law Reporting in the lower *Shari'ah* courts with a representative sample from some States.

The author concludes the work by identifying certain problems and prospects related to the *Shari'ah Legal Practice* in Nigeria. The problems include the continued treatment of the *Shari'ah* as native law and custom, the disparity in the formal status accorded to the *Shari'ah* in its applicability between the northern and southern parts of Nigeria, the unfair restriction as to the organisational structure of *Shari'ah* courts vis-à-vis their Common law counterparts, the inferior jurisdictional competence of lower *Shari'ah* courts, the scope of its application in courts throughout the country, the training of *Shari'ah* court personnel, the relative deficiency in its curriculum as taught in law faculties, some identified defects in the applicable English common in Muslim communities, access to justice, religious crises and tensions as these impact on the application of the *Shari'ah*.

The author concludes by making some far-reaching recommendations to ameliorate the identified problems and enhance the prospects of *Shari'ah* legal practice in Nigeria. Some of these include the re-organisation of Nigeria's court structure, personnel and jurisdiction to accommodate and cater for the yearnings and aspirations of Muslims across the

country. He wants to see more concerted efforts being deployed toward the training of legal practitioners who are skilled and very knowledgeable in the *Shar'ah*. He advocates a curriculum review at the law faculties to facilitate and fortify this last recommendation.

Ajetunmobi's is a book that has the potential to fill the void in our knowledge of the field of his study. Coming over a quarter of century after its presentation as dissertation, the work can benefit tremendously from an update which does away with, for instance, some of the more obvious academic and presentational restrictions imposed on all dissertations and that are replete in the work. We stand to gain even more if someone were to bring it up to date on the developments that have taken place in the last decade.

Prof Auwalu H. Yadudu
Faculty of Law, Bayero University, Kano
Dated at Kano, 4th day of May 2014

Preface

Shari'ah contains Islamic precepts that govern personal and public lives of Muslims. It is the path ordained by Allah which faithful Muslims are expected to pursue in their dealings among themselves and with people of other faiths, as well as in their interaction with nature. Those aspects enforceable in a court of law are known as '*Shari'ah* legal practice'.

Debate over the introduction and application of *Shari'ah* law in contemporary Muslim majority countries has attracted much attention of many researchers and political leaders and institutions. This book, written by late Musa Ali Ajetunmobi, a Professor of *Shari'ah* Legal Systems, in the Department of Religions, University of Ilorin, Nigeria, intervened in *Shari'ah* law discourse in the Nigerian context. The author explores the structure and administration of *Shari'ah* law in the Nigerian judicial system between the periods of 1956 and 1983. He examines the organisational structure and functions of the lower and superior courts of *Shari'ah* jurisdiction and he identifies the official provisions to facilitate the dispensation of justice in *Shari'ah* courts. He also investigates the relationship between *Shari'ah* law and other laws applicable in Nigeria. In carrying out his research, the author travelled far and wide across the country to collect relevant materials from libraries and archives, and to consult several court officials, law enforcement agencies, legal academics and practitioners, as well as legal and political authorities on *Shari'ah* law in the country.

Primarily written as a doctoral thesis in *Shar'iah* Legal System and submitted to the Department of Religions, University of Ilorin, Nigeria, in 1988, this outstanding research work remains relevant even today as it was when it was first completed. Unfortunately, the author, Ajetunmobi, died in 2008, before this publication.

Considering the book's wealth of materials and its continued relevance to the ongoing discourse on *Shari'ah* law at national and international levels, Kwara State University Press, under the Chairman of its Board, Prof. Abdul Rasheed Na'Allah, and its pioneer Director, Prof. F. Abiola Irele, decided to publish the book posthumously with a view to serving the world

community of scholars and enriching our understanding of Nigerian experience of *Shari'ah* law. A valuable contribution to scholarly output, nationally and internationally, this book stands to benefit the Nigerian legal academics, practitioners and institutions, as well as other researchers interested in the development of *Shari'ah* discourse and application of *Shari'ah* law in multi-ethnic and multi-religious societies of Nigeria and in other Muslim majority countries at large.

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Abbreviations

Alh.	Alhaji: Title for a Muslim Pilgrim
A.C.	Appeal Cases
A.C.E.	Area Courts Edict
B. A.	Bachelor of Arts
Cap.	Chapter
Co.	Company
C. E.	Christian Era/Common Era
C.I.A.C.	Chief Inspector of Area Courts
C.R.	Chief Registrar
Dr	Doctor
E.A.C.A.	East African Court of Appeal
F.S.C.	Selected Judgements of the Federal Supreme Court
G.L.	Grade Level
hist.	Historian; history
Hon.	Honourable; Honorary
JARS	Journal of Arabic and Religious Studies
JICL	Journal of Islamic Comparative Law
LL.B.	Bachelor of Laws
LL.M.	Master of Laws
L.L.R.	Lagos Law Report
L.N.	Legal Notice
M.A.	Master of Arts
n.	Note
No.	Number
NCL	Native Courts Law
ND.	No Date
N.A.T.A.I.S.	Journal of the Nigerian Association of Teachers of Arabic and Islamic Studies
N.L.R.	Nigeria Law Report
N.N.	Laws of Northern Nigeria
N.N.C.N.	Case Notes of Northern Nigeria
N.N.L.N.	Northern Nigeria Legal Notice
N.P.	No Place
N.R.	Laws of Northern Region
N.R.L.N.	Northern Region Legal Notice

N.R.N.L.R.	Northern Region of Nigeria Law Report
Opp.	Opposed, Opposite
Par.	Paragraph
Pars.	Paragraphs
Ph.D.	Doctor of Philosophy
Prof.	Professor
s.	Section
S.C.	Cyclostyled Judgements of the Supreme Court
S.C.A.	<i>Shari'ah</i> Court of Appeal
S.C.A.L.	<i>Shari'ah</i> Court of Appeal Law
S.O.A.S.	School of Oriental and African Studies Sections
UNESCO	United Nations Educational, Scientific and Cultural Organisation
v.	Versus
vol.	Volume
W.A.C.A.	West African Court of Appeal Reports
W.N.L.R.	Western Nigeria Law Report
W.R.N.L.	Western Region of Nigeria Law Report

Glossary

i. Arabic

<i>Adab:</i>	Moralities
^o <i>Alim:</i>	Learned Scholar
<i>al'Amd:</i>	Intentional
<i>Amir al-Mu'minin:</i>	Commander of the Faithful
^o <i>Aqidah:</i>	Belief, creed
^o <i>Aqilah:</i>	Relatives of a Killer who pay <i>diyah</i> on his behalf.
<i>al-Baghy:</i>	Transgression; Trespass
<i>al-Balaghah:</i>	Rhetoric
<i>Darar:</i>	Injury; damage
<i>Dinar:</i>	Popular Arabic Money like dollar, pound, etc.
<i>Diyah:</i>	Blood-wit
<i>Fatwa:</i>	Legal opinion
<i>Fiqh:</i>	Jurisprudence
<i>Fuqaha:</i>	Jurists
<i>Hadanah:</i>	Care and custody of young children
<i>Hadd:</i>	An unalterable penalty under the <i>Shari'ah</i>
<i>Hadith:</i>	Science of the Sayings, and Practices of Prophet Muhammad; Prophetic Tradition.
<i>Hajj:</i>	Holy Pilgrimage
<i>Hijrah:</i>	Migration; Islamic luni-solar calendar
<i>Al-Hirabah:</i>	Highway robbery
<i>Al-Hisab:</i>	Arithmetic/Mathematics
<i>Hudud:</i>	Limits; Aspects of <i>Shari'ah</i> law which are punishable by Allah if violated.
^o <i>Ibadat:</i>	Devotions, acts of worship
^o <i>Iddah:</i>	Retreat; Waiting period observed by a woman due to death of husband or divorce.
<i>Ijbar:</i>	Compulsion (usually in marriage)
<i>Ijmā':</i>	Consensus of opinion of jurists
<i>Ijtihad:</i>	Legal speculation made by learned jurists
<i>Imam:</i>	Leader of Muslims in ritual prayers and other Islamic engagements.
<i>Istihsan:</i>	Legal deduction through 'preference'
<i>I'tiqadat:</i>	Beliefs

<i>Jihad:</i>	Struggle (especially in the field of propagating the Islamic doctrines).
<i>Jizyah:</i>	Poll Tax
<i>al-Jughrafiya:</i>	Geography
<i>Juruh:</i>	Wounds (Talion)
<i>Kafa'ah:</i>	Equality or compatibility (mostly in marriage)
<i>Khamr:</i>	Alcohol; Intoxicant
<i>Kharaj:</i>	Land tax
<i>Khul':</i>	Divorce initiated by woman
<i>Liwat:</i>	Sodomy
<i>Masalih Mursalah:</i>	(Judgement or enactment) in the interest of public peace
<i>Mazalim:</i>	(Courts of the oppressed) Appeal Court
<i>Mirath:</i>	Inheritance
<i>Mu'amalat:</i>	Transactions
<i>Mufti:</i>	Jurisconsult
<i>(Singular. Muhami):</i>	Lawyer (lawyer)
<i>Muhamun</i>	
<i>Mujtahid:</i>	One who exercises <i>Ijtihad</i>
<i>Muqallid:</i>	an imitator, follower
<i>Muqallidun:</i>	Imitators, followers
<i>Murafa'at:</i>	Practice and Procedure
<i>Al-Nahw:</i>	Grammar, Syntax
<i>Naskh:</i>	The Common 'ordinary' Style of writing
<i>Nass:</i>	Text
<i>Al-Qada':</i>	Judgement; legal practice
<i>al-Qadhf:</i>	Defamation of character
<i>Qadi:</i>	Judge
<i>Al-Qatl:</i>	Homicide, killing, murder
<i>Qisas:</i>	Talion
<i>Qiyas:</i>	Deduction by Analogy
<i>ar-Riddah:</i>	Apostacy
<i>Ruq'ah:</i>	An extraordinary style of writing like a cursive
<i>Sadaq:</i>	Dower, bride gift
<i>as-Sahabah:</i>	Companion (of Prophet Muhammad)
<i>Salaf:</i>	Early Muslim generation
<i>Salat:</i>	Ritual Prayer
<i>ash-Shahadat:</i>	Evidences, Testimonies
<i>Shari'ah:</i>	Islamic law/Jurisprudence
<i>Shurb al-Khamr:</i>	Drinking alcohol
<i>as-Sariqah:</i>	Theft
<i>Siyasah:</i>	Politics, Policy
<i>Siyasah</i>	
<i>as-Shariyyah:</i>	Legal right of a State to enact laws; its exercise of that right.

<i>Sujud as-Sahw:</i>	Prostration of forgetfulness
<i>as-Sulh:</i>	Arbitration
<i>Sunnah:</i>	Tradition (usually of Prophet Muhammad)
<i>at-Tafsir:</i>	Qur'anic Commentary, Qur'anic Exegesis
<i>Takhayyur:</i>	Act of legal deduction by making a choice (for application) from the variant doctrines of the Islamic schools of law.
<i>Talfiq:</i>	Fusion of elements of the different doctrines of the various schools of law to form a new rule of legislation.
<i>Taqlid:</i>	Imitation
<i>at-Tarikh:</i>	History
<i>Tawhid:</i>	Islamic Theology/Monotheism
<i>Ta'zir:</i>	(Law of) deterrent
<i>‘Ulama:</i>	Learned Scholars
<i>Ummah’:</i>	Community (usually of Muslims)
<i>‘Uqubat:</i>	Punishments
<i>‘Urf:</i>	Custom
<i>al-Wakalah:</i>	Agency
<i>Wakil:</i>	Agent
<i>Wali:</i>	Marriage guardian usually of the bride
<i>Waqf:</i>	Endowment
<i>Wasiyyah:</i>	Bequest
<i>al-Yamin:</i>	Oath
<i>Zakat:</i>	Legal Alms
<i>az-Zina:</i>	Adultery/Fornication

ii. Hausa

<i>alkalai:</i>	Judges
<i>alkali:</i>	Judge
<i>Kulle:</i>	Practice of seclusion by women

iii. Latin/

Roman Words

<i>de-facto:</i>	actually, in fact
<i>de novo:</i>	a new
<i>ex parte:</i>	on one side; in the absence of a party to the suit
<i>ex-personae:</i>	over persons
<i>in toto:</i>	entirely
<i>ipso facto:</i>	by the fact itself
<i>modus operandi:</i>	manner of working
<i>mutatis mutandis:</i>	with necessary changes
<i>pari passu:</i>	with equal space; together
<i>passim:</i>	here and there
<i>per se:</i>	considered alone

<i>prima facie:</i>	at a first view
<i>proviso:</i>	limitation
<i>status quo:</i>	the pre-existing state of affairs
<i>vis-à-vis:</i>	facing; opposite

iv. Yoruba

Expressions

<i>Ajanosi</i>	An assistant to the commentator of the Qur'an, who reads the text and other supporting Arabic poems in a melodious voice.
<i>Aṣípa</i>	A public relations officer in a Yoruba society.
<i>Bàbá Àdínṣe</i>	An administrative patron of a mosque or organisation.
<i>Balógun:</i>	War leader in a Yoruba Society, a generalissimo.
<i>Egbé:</i>	Society; Organisation.
<i>Èkérin:</i>	Fourth in rank to the Head.
<i>Làdání:</i>	A crier who calls to prayer (He who invites Muslims to mosque for ritual prayers) i.e. the Muezzin.
<i>Nṓíbí:</i>	Deputy Leader of Muslims in a ritual prayer, next to the Imam.
<i>Onítàfúsirú:</i>	A commentator on the text of the Holy Qur'an.
<i>Òsì Balógun:</i>	Next in rank to Ọtún Balógun.
<i>Ọtún Balógun:</i>	Next in rank to Balogun.
<i>Pàràkòyí:</i>	A welfare officer in the society.
<i>Sàrùṁ:</i>	Commander of the cavalry.
<i>Séríkí:</i>	Commander of the youth (young warriors).

v. Notes

Allah: The proper name of 'God'. It is a unique Arabic word which has no equivalent in English. As 'God' can be pluralised, 'Allah' cannot. As 'Goddess' is feminine of 'God', 'Allah' has no feminine form. We observe that the Arabic equivalent of 'God' is 'Ilah'.

Hence, we prefer the use of 'Allah' to the use of 'God', in our own constructions in this work.

(Federal) Court of Appeal: By virtue of the Constitution (Suspension and Modification) Decree, 1984 under which 'Court of Appeal (Amendment) Rules, 1984' was promulgated, the word 'Federal' was removed from 'Federal Court of Appeal'. (See Federal Gazette No. 48, Vol. 71 of 9 August, 1984 – Part B). Since the terminal date mentioned

in the title of this work (1983) falls in the period preceding the date of change in name of the Court and since the date of completion of this work (1988) falls after the change in name of the Court, we retain the word 'Federal' but in parentheses. This style is also adopted in order not to confuse any lay reader of the thesis who may think that there is a difference between 'Federal Court of Appeal' and 'Court of Appeal'.

Islamic (Personal) Law: The word 'Personal' is also in parentheses because its original rendering 'Islamic Personal Law' in the 1979 Constitution of the Federal Republic of Nigeria has been amended by a drop of the word 'Personal' as explained in the body of this thesis. In order not to confuse readers of this work, we retain the provision in the Constitution but put the deleted word in parentheses to indicate the recent development in this regard.

Shari'ah: Is consistently used in this work, both in our construction and in other constructions where Islamic law is intended. For example, instead of the common Sharia Court of Appeal, we render it as *Shari'ah* Court of Appeal in order not to confuse uninformed readers who may think that 'Sharia' is different from '*Shari'ah*'.

Shari'ah Law and Islamic Law: Both, as used in this work, mean the same thing. They are used interchangeably, according to the popular usage of each by the operators of the law in the different sections of the judiciary.

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CHAPTER ONE

Introduction

1.1 The *Shari'ah*

We start our submission by defining the term *Shari'ah* and its scope.

1.1.1 Meaning

Shari'ah is an Arabic word which means 'the source of water' or 'the resort of one who is in need of water'.¹ It can also mean 'water hole', 'drinking place', or 'approach to a water hole'.² *Shari'ah* was popular with, and important to, the pro-Islamic Arabs who were mostly desert-dwellers due to scarcity of water in their domain. Indeed, popularity and importance of water cannot be confined to only the Arabs or the desert-dwellers but should be extended to every living being; since Allah made every living thing from water.³

With the advent of Islam, *Shari'ah* acquired a new specific meaning. It represents the revealed canonical law of Allah to mankind. It is the path laid down by Allah for mankind to follow in their search for Him on the one hand and in their dealings with one another and with other creatures of His on the other hand. Man is created for no other purpose than to worship Allah.⁴ In order to facilitate His worship, Allah prescribes a law and an open way (called *Shari'ah*) to every generation.⁵ *Shari'ah* is, therefore, the right way ordained by Allah for humanity in order to prosper and maintain peace in this world and also achieve bliss in the hereafter. It is the same *Shari'ah* which Allah vouchsafed to the Prophet Muhammad for the benefit of the whole world.⁶

1.1.2 Scope

The activity of man can be primarily classified into two: spiritual and mundane. These two are, however, interwoven under the *Shari'ah*. When man is performing his spiritually ordained duties, he is *ipso facto* training himself on how to conduct his mundane affairs in the way that peace may prevail in the society. When he performs his mundane duties, he is either rewarded by Allah for having discharged such duties

satisfactorily or punished by Him for his failure in that regard. The *Shari'ah* thereby covers every act of man from the time he is born till when he breathes his last, and from when he wakes up in the morning till he goes back to sleep at night. It even covers the mode of his sleep.⁷

The *Shari'ah* covers the following five aspects of human activity:

- | | |
|---------------------|--------------------------|
| a. <i>ʿItiqadat</i> | (Beliefs) |
| b. <i>ʿIbadat</i> | (Devotions) |
| c. <i>ʿAdab</i> | (Moralties) |
| d. <i>Muʿamalat</i> | (Transactions), and |
| e. <i>ʿUqubat</i> | (Punishments/Penalties). |

The first two fall under the spiritual act of man while the next two fall under the mundane act. The fifth aspect relates to both the spiritual and the mundane features since it covers the four others on the one hand, and the right of both Allah and man to, respectively, punish sinners and penalise criminals in the society on the other hand.

ʿItiqadat is the first of five prescribed pillars of Islam. It requires that man should believe:

- a. that Allah is unique in existence,
- b. that He is the Supreme Creator of all things, and
- c. that He has absolute power over everything.

Such a belief in Allah has led the Muslims to the study of theology, philosophy and mysticism as distinct and impregnable disciplines in Islamic Studies.

ʿIbadat covers the remaining four pillars of Islam. It concerns the worship of Allah as prescribed by Him through the Prophet Muhammad. The four pillars are ritual prayers (*Salat*), at least five times a day,⁸ legal alms (*Zakat*) once in a year,⁹ obligatory fasts in the month of Ramadan,¹⁰ and pilgrimage to Makkah (*Hajj*) at least once in one's lifetime.¹¹ Every Muslim must testify to the existence of Allah and His unity (*ʿAqidah*). He should follow up the testimony with the execution of the remaining four pillars (*ʿIbadat*). Should he neglect the *ʿIbadat*, his earlier *ʿAqidah* shall be regarded as meaningless.

ʿAdab reflects the social acts of man. It is the absolute virtue and etiquette prescribed by Allah through revelation. It is the act of doing good and forbidding evil. Its scope is wide, cutting across every act of man. Indeed, it regulates the relationship between man and his fellow human beings.

Muʿamalat covers the economic, educational, political and other social aspects of man's activities. Its coverage does not

exclude whatever profession man may choose in life and how to deal, or what to do, with his earnings, the type of education he may pursue (artistic, scientific, technological, etc.) and how to utilise the knowledge derived from there to the benefit of humanity in general. It also covers the political system a community may adopt, as well as the role of the citizens (ruler or subject) within the context of politics and administration. Furthermore, it covers all sorts of contract that man may make with his fellow man as an individual, with a group of people, or with the society at large.

‘*Uqubat* deals with the right of Allah to punish sinners and the rights of man to penalise criminals in the society. It covers all spheres of security for both the State and the individual citizens, either at home or abroad. The role of the law enforcement agencies in their various groups and the duty of members of the bench in the Judiciary are not excluded. The scope of this fifth division of the *Shari‘ah* covers all the other four divisions that precede it. Its scope is very wide and comprehensive.

1.2 Legal Practice

1.2.1 General and Legal Precepts of the *Shari‘ah*

Shari‘ah, as we have noted above, covers the entire sphere of the religion of Islam. The practice of the *Shari‘ah* is, therefore, tantamount to the practice of Islam as a religion. The two may, therefore, be regarded as synonymous in this context. However, certain precepts of the *Shari‘ah* carry the force of law while others do not. In this study, those precepts which carry the force of law are termed *Shari‘ah* Legal Practice while the others are referred to as general practice, as distinct from the legal practice of the *Shari‘ah*. An example of the general practice as distinct from the legal practice is the process of amending a ritual prayer (*Salat*) in case of omission or commission during its observance. Such a mistake in prayer can be rectified by the prescribed prostrations (*Sujud as Sahw*)¹² without necessarily leading to a court action against the worshipper. The legal practice, on the other hand, involves the act of violating any directive of the *Shari‘ah* which is enforceable in a court of law. An example is the breach of marriage contract between a couple.

Shari‘ah Legal Practice covers the five divisions highlighted above. For instance, the act of apostasy (a violation of the ‘*Aqidah*) warrants death penalty.¹³ The same (death) penalty has been prescribed for a complete denial of *Salat* (an act of ‘*Ibadat*) by a Muslim who consequently refrains from its

observance.¹⁴ Furthermore, dealing in alcohol (*Khamr*) and intentional killing of a fellow human being have their respective penalties (under the promotion of 'Adab.¹⁵ As regards the *Mu'amalat*, such acts as marriage, inheritance, and many other contractual obligations are enforceable in *Shari'ah* law courts and therefore fall under the *Shari'ah* legal practice.

1.2.2 Legal Theory and Legal Practice

Shari'ah legal theory is different from *Shari'ah* legal practice, though both are inter-related. The theory covers the speculative aspect of the law which developed through the legal speculation (*Ijtihad*) of individual jurists and jurisconsults (*Mufti*) with or without the open or tacit approval of a government.¹⁶ It involves the act of interpreting the legislation vouchsafed by Allah, the Law-Giver.

Historical development of *Shari'ah* legal theory has attracted much attention of many writers, among whom are Orientalists,¹⁷ Occidentalists¹⁸ and Orthodox or Traditional scholars.¹⁹ Their writings cover the era of Prophet Muhammad, the reign of the orthodox Caliphs, and runs through the rule of the Umayyads and the 'Abbasids to this modern age. Such writings reveal that the Qur'an, the Sunnah, *Ijma'* and *Qiyas* are the principal sources of the *Shari'ah*. Each source was studied extensively.

The legal practice deals with the execution of the legal theory in the law courts. It covers the administration of justice in its general terms. It deals with the organisational structure of courts, their jurisdiction as well as practice and procedure. It also covers court personnel and their welfare, court building, and many other related matters to the court.

1.2.3 Development of *Shari'ah* Legal Practice

Prophet Muhammad was a judge during his lifetime.²⁰ So also was each of the four Orthodox Caliphs during their respective tenure as Muslim rulers. Provincial governors also served as judges until special judges were appointed during the Umayyad rule. Judicial administration in Islam continued to improve with time and the system of appeal to *Mazalim* courts developed before the 'Abbasids seized power from the Umayyads.²¹ Notable judges of the 'Abbasids period include al-Qadi Ibn Harbawiyyah of Egypt (appointed in 329 AH), Abu al-Hasan b. ash-Shawarib of Basrah (d.399 AH), and Abu Hamid al-Isfira'i of Baghdad (d.406 AH).²²

There were no court buildings at the initial stage of judicial administration in Islam. Judges decided cases in either their respective residences or mosques.²³ However, the organisation

of the court system was orderly. There used to be a court registrar who would receive and record all cases for presentation to the judge on his arrival in court. If the cases recorded for a day were many, the untreated ones would be adjourned to the following day.

Early judges detested taking remuneration from the coffers of the government for their judicial services; so also did they abhor collecting fees from litigants. They combined the post of *Qadi* with other jobs like trading which catered for their means of livelihood. Later, judges were persuaded by the ruling authorities to receive some tokens for their services to the community. Yet, hardly did a *Qadi* earn more than twenty *dinar* prior to the advent of the ^cAbbasids who enticed judges with high remuneration.²⁴ Such enticement later led to loss of reputation and prestige by the judges who thereby became toys in the hands of the rulers. The political instability in the Muslim world which coincided with the era of the Turks did not help the need to redeem the dented image of judicial officers in Islam.

1.3 Nigeria

1.3.1 Location, Political History and Culture

Nigeria is situated within 4.0⁰-14.0⁰N and 4.0⁰-14.0⁰E. It is bounded on the west by the Republic of Benin, on the North by Niger and Chad Republics, on the east by the Republic of Cameroon and washed on the south by the Atlantic Ocean. It has an area of about 923, 768 square kilometres. Its projected population as at 1985 was about eighty million and this was 'the largest concentration of black people in the world'.²⁵ In fact, Nigeria is 'the largest geographical unit along the West Coast of Africa' and its population 'is by far the largest in Africa'.²⁶ The following table shows the population of Nigeria from 1911, when the first census was conducted, to 1963 when the country became a Republic.²⁷

Table I : Population of Nigeria: 1911-1963

Year	North ²⁸	South ²⁹		Total
1911	8,110,632	7,855,749		15,966,380
1921	9,994,515	8,069,406		18,063,921 ³⁰
1931	11,010,668	8,115,034		19,125,702 ³¹
		West ³²	East	
1952	17,007,337	4,867,801	7,217,829	29,093,007
1963	29,837,559	13,456,932 ³³	13,639,631	55,934,122

Prior to the political birth of Nigeria in 1914, with the amalgamation of the Northern and the Southern Protectorates, different ethnic groups inhabiting the area were governed by their respective local rulers under divergent political systems. There were the Kanuri and the Fulani empires in the North, the Yoruba and the Benin kingdoms in the South-West, and the Igbo, the Ibibio and other kingdoms in the South-East. Islamic political system predominated in the North while the Southern kingdoms had political systems peculiar to them. By the beginning of the twentieth century, the British had militarily subdued these empires, kingdoms and states, and ruled them separately. A Colony of Southern and Northern Protectorates were created for easy administration and control.³⁴ On 1 January 1914, the Protectorates and the Colony were administratively united by the ruling British,³⁵ but were territorially divided into four sections: Northern, Western and Eastern Provinces, and the Colony of Lagos.³⁶

Different ethnic groups with divergent cultures and orientations were thus brought together under one rule by the British Government which appointed a Governor-General for the country. The political administration changed *mutatis mutandis* with the constitutions and laws of 1922, 1939, 1946, 1951 and several other received laws from Britain, until the country became independent on 1 October 1960. She later became a Republic on 1 October 1963. The pre-Independence political arrangement of three regions and a Federal Capital prevailed until 1963 when the Mid-Western Region was carved out of the Western Region.³⁷

Civil rule in Nigeria continued till January 1966 when the military personnel seized power from the civilians for the first time in the country's political history.³⁸ In 1967, the existing regional system was abolished. Twelve States were created out of the four Regions and the Colony of Lagos.³⁹ In the same year, a civil war started as a result of misunderstanding between the major ethnic groups within the country, coupled with some socio-cultural and politico-economic problems. The war ended in January 1970, but the military rule continued.

In 1975, a palace military coup changed the military leadership of the country. Another military coup in 1976 claimed the life of General Murtala Ramat Muhammed who came into power in 1975 and General Olusegun Obasanjo succeeded him in executing his policies until 1979 when the country returned to civil rule. The Murtala Muhammed regime created in 1976 additional seven States out of the existing twelve States to make a total of nineteen States.⁴⁰ The same regime also carved out a new Federal Capital Territory in Abuja for the country in the same year.⁴¹ In essence,

therefore, the country had twenty governments under the umbrella of the Federal Government.

On 31 December 1983, the Nigerian Armed Forces seized power once again from the civilians. Although Nigeria was still under a military rule at the time of writing this work, it must be noted that the military leadership of the country had once more changed hands in a military coup of August 1985. The new military regime of General Ibrahim Babangida had created two additional States in 1987, bringing the number of States in Nigeria to twenty-one.

The major ethnic groups in Nigeria are Hausa/Fulani, Igbo and Yoruba. There are, however, hundreds of other ethnic groups in the country. According to Ahmed Beita Yusuf, there are approximately 450 communities in Nigeria with not less than 250 in the North.⁴² The different communities speak different languages, worship different deities as intermediaries between them and God, and conduct their respective daily activities under different chains of custom. Prior to the advent of British rule, most inhabitants of the areas that later became Nigeria were predominantly traditionalists, though Muslims were in large numbers in the northern areas which were largely under the government of Sokoto Islamic Caliphate. Uthman dan Fodio and his lieutenant jihadists had ruled the North for about a century before the advent of the British conquerors.⁴³

Northern Muslim indigenous rulers, scholars, and traders continued to spread the religion of Islam and its culture in the country, despite their subjugation to the British ideology which was, and still is, Christian in orientation. Christian missionaries, with tacit support of the British conquerors, also intensified their struggle to win more converts into Christianity. There were, therefore, three types of culture in the country: the indigenous, the Islamic and the Christian. Both the Christians and the Muslims competed for converts both from among themselves, and largely from the adherents of the indigenous culture. In the long run, the Christians gained more adherents than the Muslims due to the tacit support of the British government as earlier noted and also due to the fertile ground for the spread of Christianity in the South (particularly in the South-Eastern zone).⁴⁴ However, it is worthy of note that Islam had been firmly established in the South-Western zone of the country some centuries before the arrival of the British, except that there was no formal Islamic government in the area as obtained in the North.⁴⁵ The following tables give the relevant positions of the three cultures from time to time between 1931 and 1963.⁴⁶

Table II: Population Rate of Nigeria According to Religious Adherence: 1931-1963

Year	Muslim	Christian	Animist
1931	43.8%	6.2%	50.0%
1952	45.0%	21.0%	34.0%
1963	47.2%	34.6%	18.2%

Source: A.I. Doi, Islam in Nigeria p. 80

Table III: Population Rate of Northern Nigeria According to Religious Adherence: 1931-1963

Year	Muslim	Christian	Animist
1931	66.0%	0.6%	33.4%
1952	73.0%	2.7%	24.3%
1963	71.8%	9.6%	18.6%

Table IV: Population Rate of Eastern Nigeria According to Religious Adherence: 1931-1963

Year	Muslim	Christian	Animist
1931	0.35%	16.28%	83.37%
1952	0.31%	50.06%	49.63%
1963	0.30%	77.20%	22.50%

Table V: Population Rate of Western Nigeria According to Religious Adherence: 1931-1963

Year	Muslim	Christian	Animist
1931	-	-	-
1952	41.5%	40.5%	17.9%
1963	42.4%	49.3%	8.3%

Source of the Table: A.I. Doi, Islam in Nigeria p. 80 ff.

It is obvious from the tables that the percentage of Christian converts was higher than that of Muslims. Nevertheless, in terms of overall numerical figure, Muslims formed the single largest group as at 1963. Until another reliable census is conducted, it may be said that Muslims are in simple majority in Nigeria. They are found in large numbers in the Northern and Western States as well as the northern part of Bendel State.

1.3.2 Legal History

The Nigerian legal history takes the same pattern with her political history by which the indigenous culture was on gradual extermination as shown above. Northern parts of Nigeria had been operating the *Shari'ah* before the advent of the British while the Southern parts of the country had also been applying their diversified customary systems of native law in their respective localities.⁴⁷ The British later arrived in the country with their legal system and within a short time, took the advantage of their political authority to set in motion a number of machinery which eventually weakened the judicial system that had hitherto prevailed.

British merchants had been administering English law along the Atlantic coast, under the supervision of some agents of the British government, prior to the appointment of the first British Consul for the Bights of Benin and Biafra in 1849. The Consul, when appointed, had judicial authority over the commercial transactions between the British traders and the natives. Jurisdiction *ex-personae* of the British Consuls' courts was initially confirmed to litigations between the British people who were trading along the Atlantic coast but *de facto* extended to cover the natives with whom the British were trading since they (the British) had no confidence in the judicial system that governed their commercial dealings with the natives.⁴⁸ In 1853, the Bights of Benin and Biafra were divided into two, leading to the appointment of an additional British Consul with similar (equal) judicial powers. By 1983, separate British courts *per se* (with judges appointed for the courts) were established in the two Bights.⁴⁹

In 1906, British courts in the Bight of Biafra and those in the Colony and protectorate of Lagos were merged under one judicial administration⁵⁰. By 1914, plans had been completed to merge the different laws which governed the British oriented courts in the Northern and the Southern Protectorates into one judiciary. The Nigerian judiciary then became unified and centralised from 1914 to 1954 when it was regionalised and thereby decentralised once again⁵¹.

There are five major sources of Nigerian law: the custom of the people, *Shari'ah* law, English law, Nigerian legislation, and Nigerian case law. Nigerian customary law varies from locality to locality and there are hundreds of it in the country today. However, a number of such laws are similar, particularly in the area of family law⁵². The *Shari'ah*, which is supposed to govern mostly the Muslims, has been discussed earlier in this chapter. Next, therefore, are the applicable English laws in

Nigeria which are of three types: Statutes, Common law and the law of equity. British Statutes in this regard are of two groups: 'those which are made to apply directly to Nigeria by their own force and those which were 'received into Nigerian Law by local legislatures'⁵³. Most of these British Statutes which have been operating in the country since the nineteenth century have not been totally repealed⁵⁴. The same applies to the received English Common Law and its law of equity.

The enactments of the central legislature in Nigeria during the colonial period were called 'ordinances'. This term was retained by the government in 1954 when the country became a Federation (with three regional legislatures). The term 'laws' was used for the enactments of the regional legislatures. However when Nigeria became independent in 1960, the enactments of the regional legislatures retained the term 'law' while those of the Federal legislature changed to 'Acts'. Under the military rule, enactments at the Federal level are designated 'Decrees' while those of the States are called 'Edicts'. All the 'Ordinances', 'Acts' and 'Decrees' as well as 'laws' and 'Edicts', form a part of the law in the country. The Nigerian case law also serves as a source of law in the country and that is through the process of judicial precedent which affects all the applicable laws in variant degrees⁵⁵.

Administration of justice in any country revolves round the court and its related bodies like the police and the prison. Therefore, guidelines are laid down on how to control and regulate the court and its allies. Well established rules of evidence are also provided to ensure impartial judgement. 'Indeed, an independent, impartial and fearless judiciary is the greatest and surest security a community may have for constitutionalism, the rule of law, stability, and orderly progress'⁵⁶. To what extent is this statement true of the Nigerian judiciary? At present, crisis and tension exist in the Nigerian judiciary system⁵⁷. The British legal system has lorded it over both the *Shari'ah* Court and the Customary court systems to the extent that the two are continuously struggling for survival.

Native Courts Order No. 5 of 1900 introduced the application of British laws into the Northern Protectorate of Nigeria⁵⁸. Many subsequent ordinances in respect of Native Courts had little effect on the existing traditional legal system – in the country at large and in Northern Nigeria in particular – until the proclamation of Native Courts Ordinance, 1914. With the amalgamation of Northern and Southern Protectorates, attempts were made to operate a uniform judicial system in the country. The District Officer, who by virtue of his primary

duty was an administrative officer and who might not be conversant with the applicable native law and custom and the *Shari'ah*, was empowered to supervise the work of native courts⁵⁹. He was also empowered to 'enter any court at any time and observe the proceedings or go through its records'⁶⁰. The British trained administrators were thereby authorised to interfere in the judicial function of Non-English courts.

The gradual attempt of the British to superimpose her law on Nigeria as it did in India⁶¹ and other colonies of hers⁶² could be deduced from the number of ordinances she proclaimed in 1933. Hitherto, there were slight modifications in the administration of justice with amendments and repeal in 1918 of the 1914 ordinance on Native Courts. The re-organisation of courts followed in 1933 and the reform was unique with 'the restriction of the territorial jurisdiction of the Supreme Court, the creation of the High Court and Magistrates' courts for the protectorates, the re-organisation of the native courts, and the creation of the West African Court of Appeal to stand between the Supreme or High Court and the Privy Council'⁶³. The Native Courts Ordinance, 1933, though retained the existing structure and organisation of the native courts, scaled down the punishment some of the courts could impose. It made a provision for appeal which in the Southern Protectorate (particularly in the Eastern part) would lie in a Magistrates' court, while in the Northern protectorate, it would lie in the Chief Alkali's court⁶⁴. It is noted, however, that with this ordinance of 1933, the 'Resident had... the power to review the decision of any native court'⁶⁵.

The Colony District of Lagos had its first Native Courts Ordinance in 1937⁶⁶. It gave provision for the establishment of only one grade of court⁶⁷. There were many other enactments on native courts in 1943, 1948, and 1951 but such had no serious additional effect on the already downgraded customary courts. The 1954 constitution concentrated on the British system of courts rather than on the native courts. It was not until 1956 in the Eastern and Northern Nigeria, and 1957 in Western Nigeria, that the native courts further attracted the attention of the lawmakers⁶⁸. Such courts were extensively reorganised in the regions. 'Native' courts changed to 'Customary' courts in both Eastern and Western Nigeria while 'Native' was retained in Northern Nigeria until 1967 when it changed to 'Area' courts. At present, there are Customary Courts in the South and Area Courts in the North⁶⁹.

Nigerian legal system retained the structure described above with very little changes in both the independence and the

republican constitution⁷⁰. The military came into power in 1966 and ruled by decrees and edicts. Some reform committees were set up in 1976 and 1977 on the area and the customary courts respectively. Many recommendations were made by the committees and White Papers were issued on them before the production of 1979 constitution⁷¹. Most of the recommendations which can give the area courts and the customary courts their autonomy from the English court system are yet to be implemented. These will be discussed later.

1.4 Formulation of the Objectives of the Study

1.4.1 Motive and Objective

Our interest to carry out a research into the administration of the *Shari'ah* in Nigeria started in 1981 during a postgraduate course for a Master's degree in Islamic Studies at the University of Ilorin. We were persuaded by Prof. I.A.B. Balogun, our supervisor, to work on '*Shari'ah* dispensation of justice in Kwara State', a topic which was originally proposed by Mr M.O. Opeloye, a colleague in the Master's programme. We discovered during the collection of material for the Master's project that there were a number of inadequacies in the general administration of justice in Nigeria and that these anomalies had resulted in unhealthy rivalry between and among the advocates of the different laws operative in the country. We therefore decided to work on '*Shari'ah* legal practice in Nigeria' for the doctoral degree in order to make further research into the relationship between the *Shari'ah* and other applicable laws in Nigeria; and also to suggest means of minimising (if not totally eradicating) the generated crisis and tension in Nigerian judiciary on the question of the *Shari'ah*.

Our first task was to investigate into whether or not some scholars have written on the chosen topic and this took us to Kaduna, Zaria and Kano in May 1983. We discovered during the trip that two serious works, related to the topic, had been produced. They are:

- i. '*Organisation and procedure of Shari'ah Courts in Northern Nigeria*', a Ph.D. thesis submitted by Sulaiman Kumo in 1972 to the Department of Law in the School of Oriental and African Studies, University of London; and
- ii. '*Legal Pluralism in the Northern States of Nigeria: Conflict of Laws in a Multi-Ethnic Environment*', written by Ahmed Beita Yusuf in January 1976 and submitted to the Department of Anthropology, Faculty of Social Sciences and Administration, State University of New York, Buffalo, United States of America.

It was discovered that both works concentrated on the lower 'Native/Area' court; the former focusing much on the application of the *Shari'ah* in such courts and the latter comparing and contrasting the application of Islamic, customary and English laws in the courts with much emphasis on the customary laws of the animists living in the area of study. It therefore became obvious that the southern part of Nigeria, particularly the South-Western zone was not covered by the two works whereas Muslims abound in a large number in the area as analysed earlier in this chapter. We are therefore afforded the opportunity of covering Yorubaland in this work as well as covering the superior courts of record on the *Shari'ah* in Northern Nigeria, i.e. the *Shari'ah* Courts of Appeal. The research also covers the lower courts from 1972 or 1976 (where the two earlier works of Kumo and Yusuf stopped) in order to determine further developments in such courts. The work covers the highest stage a *Shari'ah* case can reach on appeal, i.e. the Supreme Court – after passing through the (Federal) Court of Appeal.

Recent developments in Nigeria call for a critical examination of her laws. There are various forms of crisis in the country and these range from political to social, economic and judicial instability and insecurity. The tension generated by the *Shari'ah* in 1978 during the debates on the 1979 draft-constitution, and by a recent debate on the application of *Shari'ah* law in Southern Nigeria, particularly in Yorubaland, reveal that many Nigerians are not properly informed about the *Shari'ah* and its *modus operandi*.

Furthermore, many enlightened people often display some elements of subjectivity on the issue. Many non-Muslims thereby have some reservations on the application of the *Shari'ah* in Nigeria and they stand firm in their opposition to its administration in the country. On the other hand, some Muslim writers, in their bid to enlighten the non-Muslims and the uninformed Muslims, overstress the divinity of the *Shari'ah*⁷². It is therefore the objective of this work to present a balanced account of the *Shari'ah*. It is hoped that the work will be beneficial, not only to academic scholars, but also to administrators as well as legal luminaries and judicial personnel.

1.4.2 Methodology and Approach

This work is a bit technical. It combines historical narration with the analysis of the law. It is therefore both theoretical and empirical. It involves analysis of data as well as evaluation of events. It actually tests the understanding of various subject-matters, letters of statutes and other forms of law by the

different interpreters of law. It also entails an amount of sociological studies. It relates the applicable laws in Nigeria to the societal problems with the view to knowing the viability or otherwise of such laws and to what extent they have been effective. The work does not leave the welfare of the administrators of the *Shari'ah* untouched. It researches into the provisions made available by the political authorities to facilitate the dispensation of justice with the *Shari'ah*. It discusses the training facilities enjoyed by court personnel and examines in general, the problems and prospects of the *Shari'ah* in Nigeria.

Information was received from both the people who are directly involved in *Shari'ah* legal practice in Nigeria and the scholars who handle *Shari'ah* legal theory in the country. Discussions were held with other people who are by one way or another connected with the application of the *Shari'ah* as well as many operators of other laws in the country. In fact, comparative analysis of the different laws was made possible with this approach. Among our informants were the Grand Kadis (past and present), the Chief Registrars or Registrars and many Kadis of the *Shari'ah* Courts of Appeal as well as the Chief Inspectors of Area Courts in the Northern States. We received useful pieces of information from many judges of Area Courts, inspectors of Area Courts, and students of Islamic law in the various higher institutions of learning in the country.

Discussions were held with some Chief Registrars of the High Courts in the Northern States, selected State Chief Judges in the North and a number of lecturers of Islamic law in Ahmadu Bello University, Zaria; Bayero University, Kano, and the Universities of Maiduguri and Sokoto. Lecturers of Islamic Studies and top officers of many Islamic bodies who are vocal in advocating the establishment of *Shari'ah* courts in the South were also interviewed. Law enforcement agents like the police and prison officials were also interviewed while the information units in the different states ministries were contacted for useful information on the culture of the different people that inhabit Nigeria.

The relevant materials in this study were collected intermittently within the six years of study. During the period, scheduled interviews were held while questionnaires were administered. Many written works were consulted in libraries and archives. Records of proceedings in many courts were perused and copies of some decided cases were collected from informants in order to elucidate the application of certain points of law.

We employed the three main approaches open to this type of study in producing this work. They are as follows:

- i. The substantive rule approach, which involves the collection of ruling and commentary on the available statutes. It was adopted in order to determine the extent to which law officers interpret the different aspects of such laws.
- ii. The case study approach, which often reveals some trends in social life, was also employed. The extent to which people (involved in a case) know their respective legal rights and demand them is always reflected in case records, and this we find useful in determining the level of people's understanding of the *Shari'ah* and its *modus operandi*.
- iii. The comparative approach was also applied. The operation of multiple laws in a society *ipso facto* leads to conflict of laws. Nigeria is, with its legal plurality, an advocate of legal harmony. She may be right or wrong in that advocacy since certain complications and advantages surely abound in any legal pluralism. Indeed, the adoption of a comparative approach leads us to an objective conclusion in our recommendation to put the legal crisis and tension in Nigeria into oblivion.

In all, we discussed with informants, administered questionnaires, consulted printed and archived materials, and collected court cases. We analysed the collected cases with the different laws of different places and of different periods in order to determine which laws are obsolete and which are constantly in use. We utilised court cases to some extent because they show clearly the aspect of the actual legal practice in the country.

1.4.3 Problems and Limitations

Some problems were encountered in the process of collecting data for this work. First, it was discovered that many courts (particularly the lower 'Area' and 'Magistrates' courts) did not keep adequate returns of cases they handled per annum. It was therefore difficult for such courts to furnish us with the required data in respect of annual cases they treated. Some superior courts of record were also involved in this inadequacy. Not all High Courts and *Shari'ah* Courts of Appeal we approached were able to supply us with their annual case returns from 1977 to 1983 talk less of the preceding years. This shortcoming has greatly affected the extent to which we could have compared or contrasted case loads in the different types of courts in the country.

Second, the response of some people interviewed on the *Shari'ah* revealed to us a kind of mistrust, fear, or lack of confidence in us and they were possibly biased in the information given us. Furthermore, some of the people interviewed on the Magistrates' and High Courts did not give us their maximum co-operation. Still, the hypocritical gesture of some people we contacted on Area Courts – who cherished the Western system but pretended to us that they preferred the *Shari'ah* system – gave us an impression that they too might have been biased in their submissions to us. All that notwithstanding, we enjoyed the maximum co-operation of many other people who held varying judicial positions (in the Area, Magistrates', High and *Shari'ah* courts) as well as the co-operation of many corporate bodies and establishments to which our questionnaires were administered.

Meanwhile, this work contains six chapters, including this introductory one. After the historical sketch of *Shari'ah* dispensation of justice in Nigeria in Chapter Two, the next two chapters examine the application of the *Shari'ah* in the lower and the superior courts respectively. Chapter Five considers the problems and prospects of *Shari'ah* legal practice in Nigeria while the concluding chapter recapitulates earlier findings and offers some recommendations.

Notes on Chapter One

1. Ahmad B. Muhammad al-Fayyum, *Kitab al-Misbah al-Munir*. Cairo: Wizarah al-Ma'arif al-'Umuniyyah, 1939 p. 421 ff.
2. J. Milton Cowan, *A Dictionary of Modern Written Arabic*, London: Macdonald & Evans Limited, 1974 p. 465.
3. Qur'an, 21:30.
4. Ibid, 51:56
5. Ibid, 45:18
6. Ibid, 21:107
7. There are many prophetic statements guiding Muslims on what to say before they sleep and where to face during the sleep.
8. At dawn, midday, afternoon, sunset, and night.
9. It has a peculiar way of calculation and specific proportionate deductions according to the different materials from which it may be due.
10. *Ramadan* is the ninth month of lunar year.
11. It is observed in Dhu-l-Hijjah, the twelfth month of the lunar year and it is compulsory only for the 'able' Muslim. The ability is determined in many ways.

12. For details on *Sujud as-Sahw*, read Abu Zayd °Abdur-Rahman b. M. as-Saghir al-Akhdari, *Mukhtasar al-°akhdariu*, trans. 1985.
13. as-Sayyid °Uthman B. Basanayn Birri al-Ju°ali al-Maliki, *Siraj as-Salik* vol. II Beirut: Dar al-Fikr, 1402/1982 p. 218 ff; vol. I Beirut: Dar al-Katib al-°Arabi., ND p. 661
14. al-Maliki, *op cit* p. 102.
15. Qur'an 2: 178 and S. Ramadan, *Islamic Law: Its Scope and Equity*. Geneva: Said Ramadan, 1970 p. 155 ff.
16. The most popular among the great jurists of Islam are those whose schools of law are extant: Abu Manifah (80-150/699-766), and Ahmad B. Hambal (164-241/780-855).
17. They include Joseph Schacht, J. N. D. Anderson, N. J. Coulson, etc.
18. They include Muhammad al-Khaduri Bik, Ahmad Amin, Ali as-Sayisi, etc.
19. °Uthman dan Fodio, and his lieutenants.
20. Divine injunctions with which he was charged with judicial responsibility abound in the Qur'an: they include 4:65; and 4:105.
21. Joseph Schacht, 'Law and Justice' in *The Cambridge History of Islam* vol. 23 ed. By P.M. Holt, Ann K.S. Lambton, and Bernard Lewis. Cambridge: Cambridge University Press, 197 p. 556 ff.
22. Ahmad Amin, *Suhr al-Islam* vol. II 4th ed. Cairo: Maktabah an-Nandah al-Bisriyyah, 1966 p. 250 ff.
23. Ibid.
24. During the early period of the °Abbasids, Qadi °Abdullah B. Lahifah received thirty dinar per month while later, during the era of al-Ma'mun, al-Fadl B. Ghanim, the then judge was on a salary of 168 Dinar per month. It was also on record that at a time, the Chief Judge of Egypt was on 2,000 dinar per month. (See *Ibid* p. 251)
25. Federal Ministry of Information, Social Development, Youth, Sports and Culture, *Nigeria 1985*. Lagos: Emaconprint Ltd. 1985 p. 2 (This work shall henceforth be referred to as FMISDYSC).
26. John Adollo ed. *Nigeria Year Book* (1972) (NP:ND) p. 17.
27. The figures in the table are extracted from *Nigeria Year Book*, 1972 p. 19 ff.
28. The North refers to the defunct northern 'Provinces', later 'Region' and now 'States'.
29. The South includes Western and Eastern Nigeria and Lagos.
30. This total excludes the population of the Northern and the Southern Cameroons.

31. Ibid.
32. The 'West' here includes Lagos.
33. This figure includes the population of Lagos and the new Mid-Western Nigeria.
34. Areoye Oyebola, Adekunle Ojelabi and Boluwaji Olaniyan, *A Textbook of Government for West Africa*, Ibadan: Educational Research Institute, 1974 p. 69.
35. A. O. Obilade, *The Nigerian Legal System* London: Sweet & Maxwell, 1989 p. 28.
36. FMISDYSC *op. cit* p. 2.
37. Mid-Western Region (Traditional Provisions) Act 1963, (No. 19 of 1963); Constitution (Transitional Provisions) Act 1963, (No. 21 of 1963).
38. Federal Republic of Nigeria Official Gazette No. 6, Vol. 53 of 26 January 1966.
39. States (Creation and Transitional Provisions) Decree 1967, (No. 14 of 1967).
40. States (Creation and Transitional Provisions) Decree 1976, (No. 12 of 1976).
41. A Federal Government Panel on the topic, headed by Justice Akinola Aguda submitted its report on 10 December 1975. In it, the panel recommended that the Federal Capital be removed from Lagos to a place more central, vast and virgin within the heartland of the country. With this recommendation, the Federal Military Government promulgated Decree No. 6, establishing a Federal Capital Territory on 4 February 1976.
42. Ahmed Beita Yusuf, 'Legal Pluralism in the Northern States of Nigeria: Conflict of Laws in a Multi-Ethnic Environment', Unpublished Ph.D. Thesis. State University of New York, Buffalo, 1976 p. 28. Other fairly large ethnic groups include the Kanuri, Tiv, Nupe, Edo, Urhobo, Izon, Igala and Ebira.
43. That was in the nineteenth century.
44. The South Eastern zone had experienced Christian Missionaries and merchants' activities since mid-nineteenth century while Islam penetrated into the area only in mid-twentieth century.
45. T.G.O. Gbadamosi, *The Growth of Islam Among the Yoruba: 1841-1908*. London: Longman Group Limited 1978 p. 4 ff.
46. Data in the tables are culled and adapted from J.S. Trimingham, *A History of Islam in West Africa*, London: Oxford University Press, 1975, p. 229, and A.I. Doi, *Islam in Nigeria*, Zaria: Gaskiya Corporation Ltd. 1984 p. 80 ff.

47. A.O. Obilade p. 17 ff.
48. Ibid. p. 18
49. Ibid.
50. Ibid. p. 24
51. D.I.O. Ewelukwa, 'Administration of Justice' in *Introduction to Nigerian Law* ed. by C. O. Okonkwo London: Sweet Maxwell, 1980 p. 59.
52. A.B. Basuwu and J.W., Salacuse, *Nigerian Family Law*. London: Butterworths, 1966 *Passim*.
53. G. Ezejiofor, 'Sources of Nigerian Law' in *Introduction to Nigerian Law* ed. by. C.O. Okonkwo, London: Sweet & Maxwell, 1980 p. 2.
54. Ibid p. 4; and A.O. Obilade p. 20
55. G. Ezejiofor p. 15.
56. D.I.O. Ewelukwa p. 55
57. References to these crises and tension are many. Before we treat such crisis in chapters three to five of this work, attention may be called to the following works: (i) Ahmed Beita Yusuf *op cit*. (ii) I.O. Agbede, 'Conflict of Laws in a Federation: The Nigerian Experience' in the *Nigerian Law Journal*, Vol. 7, 1973 pp. 48-60; and (iii) Ayo Irikefe, 'Judiciary: Has it been a Saint or Sinner' in the *Sunday Tribune*, Ibadan, Nigeria 9 March 1986.
58. Native Courts Proclamation, 1900.
59. A.O. Obilade p. 28
60. D.I.O. Ewelukwa p. 78.
61. J.N.D. Anderson and N.J. Coulson, *Islamic Law in Contemporary Cultural Change*. Sonderaruck us SAECULUM XVIII Heft, 1-2 1967 p. 38 ff.
62. Muhammad Kashim Kawali, 'Judicial Reforms in Afghanistan, 1964' in the *Journal of Islamic and Comparative Law* (JICC) Vol. 10. 1981 p. 16-38.
63. D.I.O. Ewelukwa p. 80.
64. A.O. Obilade p. 31
65. D.I.O. Ewelukwa p. 8
66. Native Courts (Colony) Ordinance, 1937 (No. 7 of 1937).
67. D.I.O. Ewelukwa p. 81
68. Customary Courts Law 1956 No. 21 of 1956; Native Courts Law, 1956 (No. 6 of 1956); and Customary Courts Law 1957, (W.R.N. Laws, Cap. 31) 1957.
69. Area Courts Edict, (No. 2 of 1967) of Kwara State is an example.
70. A.O. Obilade p. 37 ff.
71. Report of the Area Courts Reform Committee, 1976, Lagos: Federal Ministry of Information, 1977. White Paper

on the Federal and Military Government Views on the Report of the Customary Courts Reform Committee. Lagos: Government Printers, 1978.

72. Such submissions will be appropriately discussed later when reviewing the writings of pro- and anti- *Shari'ah* groups in the country.

CHAPTER TWO

Historical Sketch of the *Shari'ah* in Nigeria

Prior to the advent of ʿUthman dan Fodio as the Commander of the Faithful (*ʿAmir al-Muʿminin*) among his followers in the nineteenth century, there were not less than sixteen separate kingdoms in the area that now constitutes Nigeria¹. Some of these kingdoms had come in contact with the religion of Islam before the nineteenth century, while some others did not know of it until the twentieth century².

In this chapter, a general survey of the advent of Islam and the practice of its tenets, particularly in those areas to which Islam had spread, are examined from a historical perspective. The first section of the chapter discusses the introduction of Islam to Kanem-Borno, Hausa-Fulani and Yoruba empires prior to the advent of the British rule in the areas while the second section highlights the practice of Islamic law in Nigeria under the British imperial rule. The third section surveys the position of Islam and the dispensation of justice with the *Shari'ah* after independence, while the fourth section discusses *Shari'ah* appeals in Nigerian courts from the colonial days till the recent time.

2.1 The Growth of Islam and the *Shari'ah* in Nigeria

2.1.1 Kanem-Borno Empire

There are several historical accounts on the spread of Islam to Kanem-Borno empire. Some of the records attribute the conversion of the people of the area to Islam to some members of the Umayyad ruling house³. However, it has been established that the first Mai of the area to embrace Islam was Hume Jilmi (1085-1097 CE)⁴. His acquisition of qur'anic knowledge as well as the content of *Risalah* of Abu Zayd al-Qayrawani reveals his dedication to Islam. His teacher was Muhammad B. Mani who converted him to Islam. Since that period, descendants of the teacher of the Mai had become the hereditary Chief Imams of the empire⁵.

Although Bume acquired the knowledge of the *Shari'ah*, there was no sufficient record to support his establishment of an Islam State. What he did was the normal tradition of appointing an Imam to lead people in prayer. Many records have confirmed

that the religion of Islam had been firmly established among the ruling class of the Kanem empire before it changed name to Borno empire in 1386 CE⁶. There were Muslims and non-Muslims among the successors to Mai Hume and the devotion as well as commitment of the Muslims among them to the cause of Islam was in doubt, prior to 1386 CE. Moreover, subsequent Mai actually revived the religion in Borno empire. For example, Mai Aki B. Dunama (1476-1503 CE) established a new capital town⁷ and appointed *qadi* to administer justice in *Shari'ah* Court.

The contribution of Mai Idris Alawma (1571-1583 CE) to the progress of Islam in Borno empire cannot be overemphasized. During his reign, Islamic law gained an impetus which was unparalleled in the history of the empire. Thereafter, the religion was adulterated until a further reform came in the nineteenth century through Muhammad al-Amin al-Kanemi who had studied for five years each in al-Madinah (Arabia) and Cairo (Egypt), and for three years in Fez⁸. Political leadership of the empire shifted to his son, 'Umar (1835-1880 CE), who replaced Mai with Shaykh as title in 1846 CE. He thus became the first Shaykh of Borno⁹. He made Arabic the official language, appointed quite a number of functionaries for the established offices which included the office of a *qadi*. He founded a new capital in Kukawa – the spot he reached on the completion of the reading of the Qur'an¹⁰. The ruling of Borno till today remains among his descendants. A list of Borno rulers starting with Shaykh Muhammad al-Kanemi, father of 'Umar, is appended to this work (Appendix I).

With the establishment of Islam and its tradition in Kanem-Borno empire, Islamic culture permeated through the whole fabric of life in the empire. This had subsequently led to the application of the *Shari'ah* in the area. 'Shehu's court... served as a model for other households' and people wilfully subjected themselves to the practices available in the Shehu's Palace¹¹. Indeed, Kanem-Borno empire had been practising Islamic system of administration, at least eight centuries before the advent of British rule in the area. Furthermore, al-Mustafa B. Ahmad al-Ghalawi has confirmed the acceptance of Islam by the majority of people who lived in the Northern parts of Nigeria from the tenth to the thirteenth century of the *Hijrah*, i.e. seventeenth to twentieth century CE¹². This assertion of al-Ghalawi, as contained in *Nawazil 'Ulama'al-Takrur*¹³, reveals continuity in the progress recorded by Islam in the area.

2.1.2 Hausa-Fulani Empire

Kanem-Borno empire is older than Hausa-Fulani empire in age because Hausa towns were formed during the eleventh and twelfth centuries of the Christian Era¹⁴. The inhabitants of Hausaland were, at that time, mostly traditionalists and since their major towns were flourishing trade centres, Islam spread there as usual through external trade links. According to Doi¹⁵, Islam was introduced to Kano by a group of forty wangarawa traders among whom were Abdu'rRahman Zaiti, Kebe, Mutuku, Yakasai, Shehe and Auwula. Some historical records put the advent of Islam in Hausaland as early as the thirteenth century while some others, possibly reckoning with the conversion of the first Hausa ruler to embrace Islam, relates its introduction to the fourteenth century¹⁶. The first Muslim ruler of Kano was Ali (1349-1385 CE) popularly called Yaji, while Muhammad Korau (1320-1353 CE) was the first Muslim ruler of Katsina¹⁷. In Yauri, Chief Gimba was regarded as the first ruler to accept Islam in 1578 CE¹⁸, while in Nupeland, the first Muslim Etsu emerged in the eighteenth century¹⁹. Zamfara also had its first Muslim ruler in the seventeenth century²⁰. In all the towns, where Muslims were found to be in either majority or minority, mosques were often built for the facilitation of congregational prayers. Imams were appointed to lead Muslims in prayer in such mosques while, in some areas where Muslims had acquired impregnable authority, *qadis* were appointed to administer justice with the *Shari'ah*²¹.

Islamic education goes *pari-passu* with the introduction of Islam into any domain. As such, Qur'anic studies flourished in Kano soon after Islam was introduced into the town. Not only that, the acquisition of Islamic jurisprudence gained group during the reign of Ya'qub (1453-63 C.E) when 'Fellata came to Hausaland from Mali bringing the disciplines of *Tawhid* (dogmatics and grammar' ²². However, the reign of his successor, Muhammad Rimfa (1463-1499 C.E) was unprecedented in the history of Islamic scholarship in Kano. Islamic scholars came to the town during the period from different parts of the Muslim world²³. Prominent among such scholars was Muhammed B. 'Abdul'l-Karim al-Maghili, a professor at the Sankore University in Timbuktu, who had stayed for a while in Katsina before moving to Kano. The practice of women seclusion popularly called *Kulle* in Hausa began during the reign of Muhammad Rimfa. Furthermore, many more scholars of repute came to Kano during the reign of Muhammad Kisoki (1509-1565 C. E.). The following books were brought and taught by those scholars:

- i. *Kitab ash-Shifa* of ʿIyad b. Musa
 - ii. *Kitab al-Mudawwanah* of Sahnun
 - iii. *Kitab al-Jamʿ as-Saghir* of as-Sayuti; and many others²⁴.
- One of the prominent scholars of Mali was appointed *qadi* by Kisoki.

Katsina was also an important Hausa town of the period under consideration. Islamic education and learning were equally flourishing in the town as in Kano. The contribution of Ibrahim Maje (1494-1520 CE) in turning Katsina to an Islamic State has been recorded by many writers²⁵. He appointed one Ibrahim al-Tazakhti (d.1529/30 CE) as a *qadi* but hitherto, al-Maghili had served him in many capacities, al-Maghili arrived Katsina in 1483 CE and attempted to reform the practice of Islam in the town before he left to settle in Kano due to jealousy and rivalry of other Katsina scholars with him²⁶. His short stay in Katsina actually enhanced the plan of Ibrahim Maje to make Islam the State religion²⁷. However, before al-Maghili left for Kano, some references pointed to him as *al-Qadi* in Katsina²⁸. He actually contributed a lot to the progress of Islam in Hausa land. He invited a number of Muslim scholars from Arabia to live and teach in Kano and he wrote a treatise on how to conduct State affairs according to Islamic teachings as a guide to Muslim rulers in Hausaland²⁹. He also influenced the appointment of one Ahmad as Imam and one Abdullahi as *Qadi* from among the many Islamic scholars he met in Kano³⁰. Islam has thereby gained a very sound and firm foundation in Hausaland from the fourteenth century to the extent that the people did not only perform Islamic rituals of praying, fasting and paying *Zakat*, they were also bound by the *Sharʿah*³¹.

However, the practice of Islamic tenets were later adulterated with old pagan practices – as happened in Kanem-Borno empire to the extent that ʿUthman dan Fodio had to embark on a *Jihad* to re-establish the pristine Islamic teachings, in the nineteenth century of the Christian Era.

ʿUthman dan Fodio was born in Gobir in 1167 AH/1754 CE to a family of Islamic scholars. He thereby had an Islamic upbringing. His *Jihad* was not to introduce Islam into Hausaland but to reform its practice so that it might conform with the dictates of Allah and His Messenger Muhammad as contained in the Qurʾan and the *Sunnah* respectively. He established an Islamic State where the *Sharʿah* was applied in full force, being the basis of the administration in all perspectives. By way of illustration, the far away Adamawa in the East and Ilorin in the Yorubaland which were under this Hausa-Fulani empire were governed by the *Sharʿah*.

2.1.3 Yorubaland

It is on record that Islam was known to the people of Yorubaland during the sixteenth century³². However, one writer maintains that Islam was introduced into the area 'in the early seventeenth century'³³. Quoting another source, I.A.B. Balogun states that:

The important thing to note about the spread of Islam ...is that it had already become a factor in the country (i.e. Yoruba country) before the Fulani Jihad of 1804. By the end of the eighteenth century and the beginning of the nineteenth century, Islam had gained a foothold even as far South as the coast, where European travellers bore witness to the flourishing state of Muslim communities³⁴.

Controversy over the date of the introduction of Islam to Yorubaland notwithstanding, traders and itinerant Muslim scholars from Nupe, Hausa, Borno and Mali empires contributed in no small measure to the spread of the religion to the area³⁵. Many people of the area were converted to Islam, which soon afterwards became prominent in the society. Titi Euba mentions the massacre of Muslims in Oyo Empire at about 1797 CE³⁶, while Gbadamosi confirms the practice of Islam in Owu before its destruction in 1825 CE³⁷. Gbadamosi also narrates the colourful 'Id al-Fitri ceremony of March 1830 CE in Badagry as well as the message of the ruler of Ilorin in 1829 CE to Sokoto for a *Fatwa* on castration³⁸. In Lagos, Islam became pronounced with the expulsion of Oba Kosoko to Epe in 1851 CE. His Muslim supporters, including his Imam went into exile with him and they turned Epe to an Islam State before their return to Lagos later in the nineteenth century³⁹. The arrival of Muslim returnees from Sierra Leone and Brazil to Lagos also turned Eko to a city with Muslim majority within a short period. We may therefore summarise that Islam was not new in many towns of Yorubaland, at least, two centuries before the advent of British rule in Nigeria.

As in Kanem-Borno and Hausa-Fulani empires, Yoruba Muslims initially organised themselves under their Imams who led them in prayers and guided them on how to conform with the Islamic way of life. Prayers were observed congregationally every day, and every week in the mosque (on Fridays), and periodically during the Islamic festivals of 'Id-al-Fitri and 'Id-al-Kabir. Unlike the above two other empires where Islam gained impetus through the contribution of Muslim rulers, Yorubaland did not have many prominent kings to aid the cause of Islam. Early Yoruba Muslims thereby resorted to the formation of

societies called '*Egbé*' in order to facilitate the propagation of Islam. Each society had its officers whose roles were well defined to avoid overlapping and clash of duties in running the society. The various posts and offices available in a Yoruba Muslim society are described as follows:

In its full bloom, the Muslim administrative system consisted of the Imam, Noibi, Onitafusiru, Baba Adini, Balogun, Otun Balogun, Osi Balogun (sometimes called Eketa), Ekerin, Ajanosi, Seriki, Parakoyi, Sarumi, Asipa and Ladani⁴⁰.

That notwithstanding, there were a few Muslim Yoruba kings who contributed their quota to the spread of Islam in their respective domains. Such kings include those of Lagos and Timi Abibu Lagunju of Ede. Islam had been firmly established in the ruling house of Iwo as early as 1860 while Awujale Adetona Fusigboye (1906-15) was the first Muslim ruler of Ijebu-Ode. Oba Oyewole of Ikirun was also a Muslim and he even had a *qadi* from Ilorin named Mallam Bako⁴¹. In Eko-Epe, the first Muslim ruler emerged around 1875 while Alaafin Lawani Agogoja, who ascended the throne in July 1905, became the first Muslim Alaafin of New Oyo empire.

Muslims in Yorubaland, like their counterparts in other parts of the Muslim world, were conscious of the role Islam should play on them by advocating the dispensation of justice with the *Shari'ah*. Their agitation for the *Shari'ah* was as old as the religion itself in their respective domains. Detailed discussion of this topic is presented in the next section but in the meantime, an illustration of these Muslims' consciousness is hereby given. It is of note that Muslim Akus in Fourah Bay, Freetown, were given 'the privilege of having their own *qadi*'s court for a while⁴². On their return to Lagos late in the nineteenth century, Lagos Muslims petitioned Governor Carter to allow them to dispense justice with the *Shari'ah* like their fellow Muslims in India. They were spurred to forward the petition by the unsatisfactory nature of British legal system to their environment, as observed from a case of one Captain Shanklin, in addition to their experience in Freetown⁴³. There was however no favourable response to the petition.

2.1.4 Islamic Law in Kanem-Borno, Hausa-Fulani and Yoruba Empires

Some Mai of Kanem-Borno empire did not stop at merely converting to Islam but they made efforts to establish an Islamic State in the region. Efforts were also made to study Islam and its divine law in detail, towards the facilitation of dispensing justice with the *Shari'ah*. Mai Ali B. Dunama (1476-1503 CE)

often visited his Chief Imam to acquire a knowledge of Islamic law while Shaykh Muhammad al-Kanemi acquired Islamic Studies at Calio, Fez, and al-Madinah. Muslim rulers of Kanem-Borno and Hausa-Fulani empires did not only enforce the application of the Maliki doctrines of Islamic law like their counterparts all over West Africa, but they complementarily attempted to reorganise the fiscal system of the empires to conform with the *Shari'ah*. Al-Kanemi arranged the collection of taxes according to Islamic categories of *Zakat*, *Kharaj* and *Jizya*⁴⁴ while an eighteenth century ruler of Kano taxed the 'Ulama' in his town⁴⁵. The reign of Idris Alawma (1571-1583 CE) of the Kanem-Borno empire can be likened to the reigns of Muhammad Rimfa (1463-1499 CE) of Kano and that of Ibrahim Maje (1494-1520 CE) of Katsina in terms of establishing Islamic States. The three reigns witnessed strong legal study and practice. In the territory of Idris Alawma, disputes were referred to the *qadis* and not to chiefs or the Mai⁴⁶.

Trimingham⁴⁷ asserted that *Shari'ah* legal practice must have started in Kanem-Borno empire during the reign of Ali b. Dunama (1476-1503 CE) but this has been disproved by Fisher⁴⁸ in his discovery that a Mai in the twelfth century was imprisoned by his mother for executing a thief instead of administering the Qur'anic punishment. Other proofs of a wide application of Islamic law in Kanem-Borno empire may include a successful intervention by a scholar to prevent al-Kanemi from hanging two girls for fornication; and the practice of some *qadis* who often disallowed the oath of a Muslim who had eaten the Christian bread of the first European visitors⁴⁹ (for reasons best known to them).

Many references are available on the dispensation of justice with the *Shari'ah* in Hausa-Fulani empire of the nineteenth century. One of such works is *Ihya' as-Sunnah wa Ikhmad al-Bid'ah* of 'Uthman dan Fodio on which Prof. I.A.B. Balogun had worked. It was discovered that *fiqh* section of the book consists of twenty-six out of the total thirty-three chapters⁵⁰. Aspects of Islamic legal practice are contained in chapters twenty-two to twenty-six of the book. One striking discovery in the book is that the writer speculates that administration of justice in the empire should not be confined to the application of Maliki doctrines but that other speculations in other schools of law may be applied – a licence for free *Ijtihad* in the form of *Takhayyur* or *Talfiq*. The same view is contained in many other works of Uthman dan Fodio like *Irshad al-'Ummah* and *Tawqif al-Muslimin 'ala Hukm Madhahib al-Mujtahidin*⁵¹. Another legal work of the period which guided judges is *Diya' al-Hukkam* of 'Abdullah

dan Fodio. The book contains some guidelines on the quality of a *qadi*, his duties and function, and all other related matters to the running of a just and fair judiciary. All these and many other works vindicate ʿUthman dan Fodio and his lieutenants as *fuqaha* whose empire was based entirely on Islamic principles⁵². Ahmad Beita Yusuf⁵³ relates that there were not less than twenty-five metropolitan *alkali* within the Caliphate of ʿUthman dan Fodio as at 1806 CE.

Correspondence between Fulani *jihad* leaders and al-Kanemi of Borno is another proof of the practice of Islamic law in the two empires. For example, a Borno *ʿalim* once raised objection to attendance of ʿUthman dan Fodio’s public lectures by women⁵⁴ and therefrom an academic exposition on the legality or otherwise of such appearance of women in public gatherings ensued. Furthermore, Ali Abubakar⁵⁵ has examined, in detail, the correspondence between Fulani *jihad* leaders and Shaykh Muhammad al-Kanemi and has concluded that official records in the two empires were kept in Arabic, and that *qadis* delivered judgements in accordance with the provisions of Islamic law. In fact, the application of Islamic law in both Kanem-Borno and Hausa-Fulani empires was wider in scope than its application in Yorubaland.

The intra-ethnic wars in Yorubaland between the eighteenth and the nineteenth centuries surely had adverse effects on the application of Islamic law in the area. That notwithstanding, ‘Islamic State had been virtually won *de facto*’ in ‘places like Iwo, Ikirun, and Epe’, though Lagos lost the battle of establishing *Qadi* courts⁵⁶. By 1894, Islam had gained ground in the entire Yorubaland and the general pattern of life of the Muslim community was conducted in conformity with the *Shariʿah*.

In the period 1861-1894, a most striking feature of the development of Islam was the further entrenchment of Muslims in the political set up of many of these (Yoruba) towns and the corollary movement towards the establishment of an Islamic State⁵⁷.

Yoruba Muslims organised themselves towards the establishment of an Islamic State through the patronage of societies with Islamic bias as earlier discussed. The officials of these societies ‘looked after the central mosque, made necessary arrangements about the festivals and prayers, welcomed important visitors, and settled disputes such as might concern Muslims’⁵⁸. The organisational structure of these societies was so attractive and effective that by 1908, at least half of the population of Ijebu-Ode was constituted by Muslims who worshipped in not less than twelve mosques while the

same fraction was maintained by Muslims in Lagos population of 1901 with a remarkable increase to sixty per cent Muslim population in 1908. According to a survey carried out by Christians in 1908, there were three times as many mosques as churches of all denominations in Lagos⁵⁹.

Activities of Yoruba Muslim societies were enhanced by the preaching and teaching of competent Islamic scholars who were knowledgeable not only in the Arabic language and its allied disciplines but were also versatile in Qur'anic exegesis, the Prophetic Sunnah and *Hadith*, science of Islamic theology and History. These scholars taught with many books among which were books of Islamic jurisprudence.

On law, the standard work used was the famous compendium, the *Risala* by Ibn Abi Zayd al-Qayrawani together with the *Mukhtasar of Khalil al-Jundi*, a fact which immediately reveals which school of law was popular among the Yoruba Muslims⁶⁰.

Kitab Jumlat al-Masa'il wa al-Fatawi by one °Ali B. Al-Husain al-Samidi was among many other Islamic legal works taught by Yoruba Muslim scholars.

The major problem which confronted the consolidation of *Shari'ah* dispensation of justice on a larger scale in Yorubaland was the activity of Christian missionaries on the one hand and that of the British government on the other. Gbadamosi⁶¹ reveals the various means and methods adopted by the Christian agents in formal and informal ways to exterminate Islam from Yorubaland, talk less of its legal practice. Christians and the British Government left no stone unturned to uproot the *Shari'ah* where it had been firmly applied like Iwo, Ede, Ikirun, Badagry and Epe. Native law and custom was introduced to replace the *Shari'ah* law and Native Courts were set up with admixture of adherents of different religions as members. In conclusion, Lagos which forwarded a petition for the application of Islamic law in 1894 was denied its rights to apply it as earlier noted, despite the fact that the petition was very well articulated by the signatories who were prominent enlightened Muslims in the town. They were Muhammad Shitta Bey, Yusuf Shitta, Al-Imam Ibrahim, Ahmad Tijani, Othman Animashawun and many others⁶². The gradual approach of the British Government to put the practice of Islamic law into oblivion in Nigeria is discussed in the next part of the chapter.

2.2 Application of the *Shari'ah* Under the Colonial Rule in Nigeria

Shari'ah law was the fundamental law in all towns and villages of the Islamic State established by °Uthman dan Fodio and his

lieutenants prior to the advent of British rule in Nigeria. Islamic law was applied in all its ramifications, ranging from moral to commercial and penal codes, throughout the Caliphate as well as in notable towns of Yorubaland. Maliki doctrines were their favourites among the doctrines of the famous schools of law. With the ability of ʿUthman dan Fodio's lieutenants to reform Islam in areas where the *Shariʿah* had governed for many centuries and to introduce it and its law as a new religion and a way of life to many other areas inhabited by the animists, *Shariʿah* thereby governed the political, economic, social, cultural, educational and juridical spheres of life in the lands under the Caliphate. However, it is customary for any conqueror to subjugate the inhabitants of the conquered territory to its political, economic, social and other spheres of life and the British rulers were no exceptions in this natural tendency. Soon after they had conquered Nigerian land, their governor was empowered to grant 'rights of occupancy to natives and non-natives, for definite or indefinite terms...' ⁶³ whereas this is the land customarily owned by the native Nigerians ⁶⁴.

British administrators were however tactical in their approach towards the juridical subjugation of Nigeria. Their pronouncements revealed that they preferred a gradual approach in order to avoid violence. Lord Lugard said: ⁶⁵

The time is now, in my opinion, ripe for a change, but the changes must be gradually introduced if they are to be effective, and not alienate the confidence of the people.

Furthermore, the Colony Commission's Report on Native Courts revealed that there was no desire by the British government to force the pace in introducing changes into laws to be administered and in procedure in Native Courts. 'The aim is to develop the Native court System until a single system of law applicable to all persons and all causes evolves but the dual system must continue to administer customary law in the Native Courts and English law in the English courts' ⁶⁶. We hereby survey the extent to which the British notion of 'single system of law' had succeeded and the effect of such legal harmony on the existing native law and custom, particularly on the *Shariʿah*.

2.2.1 Judicial and Legal Policy of the British

The Islamic systems of governance and administration, as found by the British conquerors in Northern part of Nigeria were of such a high quality that they had to be initially retained by the colonial rulers. There were lower *Shariʿah* courts in the

principal towns, cities and village. These were complemented by Emir's *Siyasah* tribunals which were courts of superior record. They were all regarded as Native Courts and they exercised both civil and criminal jurisdiction. However, the extent to which they could exercise criminal jurisdiction can be deduced from parts of Lord Lugard's address to the Sultan and the people of Sokoto in 1903:⁶⁸

The High Commissioner will be guided by the usual laws of succession and the wishes of the people and chiefs but shall set them aside if he desires for good cause to do so... the Alkalais and Emirs will hold the law courts as of old, but bribes are forbidden, and mutilation and confinement of men in inhuman prisons are not lawful. The powers of each court will be contained in a warrant appointing it. Sentences of death will not be carried out without the consent of the Resident... Government will in no way interfere with the Mohammedan religion. Every person has the right to appeal to the Resident who will however endeavour to uphold the power of the native courts to deal with native cases according to the law and custom of the country.

Soon afterwards, the British rulers started to interfere with the system of justice administration in the Native Courts in order to forge legal harmony by which English law system would eventually become the fundamental law in the country. They recognised the viability of Islamic law as applied in Northern Nigeria but they continued to set in motion the machinery to whittle it down⁶⁹. It was ruled that the practice and procedure of native courts should be in accordance with the Native law and custom and it was simultaneously ruled that every commissioner of the provincial court and of the Supreme Court had access at all times to a Native Court for the purpose of suspending or reducing a sentence or ordering a re-hearing or transferring a case to his own court at will⁷⁰. Cases in which parties belonged to different religions were appropriately directed to Provincial Courts for trial but all rulings that might be made locally by either the Emir or the Native Authority were inappropriately subjected to the approval of the Governor⁷¹. All these were done by the British ruling authority so that in the long run 'advanced commercial relations will...be regarded by English law' and 'the practice and procedure in the Native Courts would gradually follow the English practice and procedure'⁷².

As the British met a system of administration which they found difficult to change in the North, it was easy for them to subdue Eastern part of Nigeria to their rule and system because,

according to Lugard,⁷³ there was anarchy and weak authority due to tribal disorganisation in the area. However, with regard to the Western part where the situation was an admixture of the prevailing features in both the North and the East, Islamic law was not allowed to govern cases of Islamic matter. Many writers have attested to the informal application of Islamic law in the Region during the colonial period. According to Shittu,⁷⁴ a *Shari'ah* court established in Ede in 1913 shifted venue to another area of the town in 1914. He narrated further that the *alkali* of the court was called Sindiku who 'recorded the proceedings in the Arabic language'. In 1923, the Muslim population of Lagos renewed their request for the establishment of *Shari'ah* courts in the town but their petition was unattended to by the government. They were spurred to that demand by the 'unsatisfactory decision of a Lagos English court in the case of the Awawu Thomas who had been married to a man against her wish'.

Muslims' request for the establishment of *Shari'ah* courts in Yorubaland was not limited to Ede and Lagos, rather, it is on record that a group of Islamic scholars in Ibadan had equally demanded for such type of a court in 1938 while the Muslim Congress of Nigeria with its headquarters in Ijebu-Ode had addressed a letter on the same issue to the Chief Secretary to the Government sometime before Independence. Shittu⁷⁶ also reviewed an earlier memorandum forwarded by the said Muslim Congress to Brooke Commissions of Inquiry and the review indicated that over 95 per cent of the 4,000 divorce cases tried in only two of Ibadan native courts in the early (nineteen) twenties were between Muslim couples who were separated 'like dogs without regard to the instructions laid down in the Holy Qur'an'.

Many of the British officials were hostile, not only to the establishment of *Shari'ah* courts for the Muslims in Southern Nigeria but also to the establishment of Native Courts in the colony⁷⁷. Such officials adopted various methods to undermine the *Shari'ah* and the native law and custom which they found operating favourably to the natives before their arrival. They took advantage of many things to whittle down the status of the *Shari'ah*. First, they applied the British 'repugnancy clause' to nullify Islamic cases. According to Sulaiman Kumo⁷⁸, the share of one-eighth to either a wife or co-wives of the prepositus as allotted under Islamic law of succession, and the Islamic law of paternity by which a disputed child belongs to 'the bed', would be regarded repugnant to natural justice, equity and good conscience by the British judicial officers. Second, personal confession of a party to a suit under Evidence law

which is accepted in Islam was used to castigate the *Shari'ah* as discussed below. Third, case law through judicial precedent from superior courts was equally applied against the *Shari'ah*. Fourth, Native Authority Bye-Laws were mostly monitored and tailored by the British judicial officers to favour their own interest at the expense of the natives' interest which such bye-laws were intended to protect⁷⁹. The colonial rulers who initially promised to protect the religion of every citizen later encroached on people's religious rights through legislations on some occasions and through disapproval of legitimate requests to establish *Shari'ah* Courts on some other occasions⁸⁰.

2.2.2 British Proclamations, Ordinances and Laws

The first British legislation to govern Native Courts in Northern Nigeria was native courts' Proclamation No. 5 of 1900. It gave recognition to the existing *Alkali* Courts prior to the subjugation of the area to British rule. It was amended by Native Courts Proclamation No. 11 of 1904. This was later repealed in 1906 and re-enacted by Native Courts Proclamation No. 1 of 1906 which had two distinct characteristics as compared to the proclamation it repealed:

- i. It was intended to meet the requirements and conditions of pagan tribes in the North; and
- ii. The courts were graded with it to four (A, B, C & D)⁸¹.

The 1906 Proclamation later appeared as Chapter 56 in the 1910 edition of laws of Northern Nigeria before it was repealed and re-enacted by Native Courts Ordinance No. 8 of 1914 which was made applicable to the two Protectorates of Nigeria (North and South).

In the South, the first British legislation on Native Courts was Native Courts Proclamation No. 9 of 1900 which was repealed and re-enacted by native courts Proclamation No. 25 of 1901. It was amended by Proclamation Nos. 17 and 23 of 1903 and later repealed and re-enacted by Native Courts (Protectorate, Central, and Eastern Provinces) Proclamation No. 7 of 1906 which governed the Native Courts in the Eastern and Western Provinces and which later appeared as Chapter 123 in the 1908 edition of the Laws of Southern Nigeria. In pursuance of the British policy of legal harmony in Nigeria, the 1908 Proclamation was repealed and re-enacted by Native Courts Ordinance No. 8 of 1914. However, the Colony was not governed by the aforementioned Proclamations and Ordinances because it did not have its Native Courts of this nature until the promulgation of Native Courts Ordinance No. 40 of 1937 which came into effect on 1 April 1938. The 1937 Colony

Ordinance in this regard appeared later as Chapter 143 in the 1948 edition of Laws of Nigeria.

Native Courts Ordinance No. 8 of the 1914 was the first British Ordinance to govern all Native Courts in Nigeria at large. With it, Native Courts followed the same pattern of organisation and applied the 'Native law and custom'. The Ordinance was amended by Native Courts Ordinance No. 15 of 1915 and it was repealed and re-enacted by Ordinance No. 5 of 1918 which later became Chapter 5 in the 1923 edition of the laws of Nigeria. It was replaced by Native Courts Ordinance No. 44 of 1933 which became Chapter 142 in the 1948 Revised edition of the Laws. Native Courts Ordinance which emerged as No. 36 of 1948 was later repealed by the amending Ordinance No. 2 and 3 of 1951.

It becomes apparent from the foregoing that prior to 1914, separate proclamations governed the Northern and the Southern Nigeria Native Courts but henceforth, the two areas were governed by uniform Ordinances. The British policy of legal harmony is discernible in both the Proclamations and the Ordinances which were aimed at superimposing the British judicial and legal systems over the *Shar'ah* and local custom of the natives. For example, Native Courts Proclamation No. 5 of 1900 empowered the Residents to establish courts at towns selected with the consent of the Principal Emir or the Chief but at the same time tied the establishment of such courts to the approval of the High Commissioner. Should an Emir or a Chief consent to the establishment of a court but the High Commissioner disapproves, a clash of authority would be imminent and this would lead to bad blood and tension. Not only that, the Proclamation gave no provision for appeal but for transfer and review of cases by the Commissioners of the Provincial Courts who would naturally be inclined to transfer cases to their courts or to adversely review cases, in order to make their superior position and status felt by the populace – an attitude which would undermine the status of the native judges who originally tried the case in the first instance. In practice, each District Officer would tour the Native Courts in his area of jurisdiction in order to go through the proceedings and to change or cancel the decisions of the court(s).

Every month, the court clerks had to bring their record books to the District Officer who could read and cancel any decision which did not suit his views without seeing the parties and confirm the one which suited him, and then sign their books till the following month again⁸².

The British approach to whittle down the *Shar'ah* through legislation took various forms. In 1909, the Criminal Code was

translated into Arabic for the understanding of the *alkalai*, so that, perhaps, they would prefer it to the *Shari'ah* penal law or at best to prepare them for the future application of British codes with the anticipated success of legal harmony. Anderson⁸³ has revealed how the confusion created by the wording of certain aspects of the Criminal Code had led the Crown Counsel of the Northern Provinces to set aside seven orders of retrial in the Kano Division of the Supreme Court in the late (nineteen)-forties. Would such confusing contents of the Code not lead the native court judges astray, should they be forced to apply them? Furthermore, Lord Lugard had in May 1915 directed that the functions of the Judicial Council should 'as a rule be limited' to certain matters, 'leaving to the Alkali's Courts all ordinary criminal cases dealt with in the law books'⁸⁴. He was surely apprehensive of the deficiencies of English law by giving such a directive. Finally, the Native Courts were empowered to try some cases according to the dictates of the *Shari'ah* on the one hand, and the British officials could apply English laws to review such cases on the other hand. Organisational structure of the courts was thereby messed up to confuse the judicial system so that in the long run, the English system would prevail over others.

2.2.3 Organisation of the Courts

Establishment of Native Courts in the Protectorate of Northern Nigeria initially followed the pattern existing in the area prior to the advent of British rule as earlier discussed. In the South, Native Courts were established in accordance with the need of various communities. There were 633 Native Courts in the North, 631 in the West, 624 in the East and 17 in Lagos as at 1949⁸⁵. By 1950, the number of courts in the North had increased to 81 appeal courts and 642 other Native Courts out of which 17 were Emirs' Grade 'A' Unlimited Courts⁸⁶. Emirs' Courts in the North were mostly Judicial Councils which, in addition to deciding cases, also had the power to make rules⁸⁷. Assisting the *alkalai* in Native Courts were the *jurisconsults* (*Mufti*) whose duty was to guide the *alkalai* towards arriving at correct provisions of the law in deciding cases before the court. Realisation of the importance of such a guidance caused the composition of the Judicial Council to include a well-qualified *alkali*⁸⁸ who would guide the council so that its decisions would not run contrary to the provisions of the *Shari'ah*. In the South, there was 'no limit laid down as to the number of members who form a Court'⁸⁹. As many as 19 members would sit in a Native Court at a time, each asking questions pertaining to the case from the litigants. The complexity and undesirability

of this practice caused the Colony Commission of Inquiry to recommend the reduction of 'benches to a president and three or four members at most'⁹⁰. However, justice was more easily attainable with such a high number of court members than when the district officer used to preside over Native Courts. Prior to the enactment of Native Courts Ordinance, 1914, Dr Maxwell observed that:

The District Commissioner or Assistant District Commissioner was the Court, and the Native members were merely figure-heads. He took the evidence when he was present, he gave judgement, and in practice he frequently gave judgement without consulting the Native members, and the more experienced he was the less important were the Native members⁹¹

Lugard related further that 'in one case, a District Commissioner adjourned the court till its members should concur in his view'.

According to the Report of Brooke Commissions of Inquiry⁹², remuneration of Native Court judges varied from town to town. In the North, the Chief *Alkali* of Borno, Kano, Katsina, and Sokoto received £480 (₦960), £864 (₦1,728), £432 (₦864), and £650 (₦1,300) per annum respectively. In Kano, grade 'A' *Alkali* received £350 (₦700), grade 'B' £230 (₦460), grade 'C' £170 (₦340), and grade 'D' £108 (₦216) while the President of the Mixed Court received £250 (₦500) and a personal allowance of £80 (₦160) per annum, whereas each of the three members of his court received £228 (₦456) per annum. Comparatively, the president of a Native Court in Oyo received only £84 (₦168) per annum while his Vice received £72 (₦144) per annum. With regard to Eastern Provinces, an example can be cited of Onitsha where court members were paid as low as £¼ (₦1.50) per month though, some others may receive as high as £3 (₦6). 'In some courts, sitting fees have been as low as 9 pence (₦0.075) to 2s 3p (Two shillings and three pence (₦0.225) a session'. The usual practice in some areas was to divide about forty per cent of the court fees by the court members but some proposals were made later to the payment of fixed monthly salary, ranging from 30s (thirty shillings) (₦3) to £3 (₦6) a month per every court member of the area⁹³. This type of diversified system of remunerating judicial officers would *ipso facto* lead to corruption of court personnel.

The condition of Native Court judges was worsened by lack of adequate court buildings. Around 1916, Lugard ordered that 'court-houses' be built for the native court system so that judges could psychologically feel assured of reputable status which

would commensurate with the status of other judicial officers of the English system in the society⁹⁴. We have no record of how many of such court-houses were erected. If built at all, the number must be small. On prisons, there was an order by the same Lugard⁹⁵ that native court prisons should be confined separately from prisoners convicted by English courts 'where it is possible to do so'. By 1950, records reveal that there was a total of 111 prisons in Nigeria, 65 maintained by the Native Authority and 46 maintained by the Government⁹⁶.

Functions of the Native Courts are contained in the following section of the chapter but meanwhile it is important to note that Evidence Ordinance was not applied in all Native Courts although practice and procedure in Native Courts of the Colony followed English law in a modified form⁹⁷. It is also of note from the same source that appeals often lay in the Supreme Court or the Magistrates' Court from the Native Court and the Governor was empowered by the law to receive and deal with all death sentences⁹⁸. Finally, records of Native Courts in the North were kept in Arabic, Hausa and English. A Specimen of Native Court Warrant printed in both Arabic and English is appended to this work (Appendix II). Concludingly, Brooke Commissions of Inquiry viewed the inherent anomalies in the administration and organisation of Native Courts and recommended among many others, the abolition of (i) the advisory powers and powers of control exercised by the District Officers, (ii) the appellate jurisdiction of the District Officers and the Magistrate Courts, and (iii) the powers of the High Court to review cases which were not brought before it on appeal. The report also recommended the establishment of a Muslim Court of Appeal with power of hearing appeals from Emirs' Courts of Appeal with power of hearing appeals from Emirs' Courts and the Chief Alkali's Courts⁹⁹.

2.2.4 Function of Native Courts

There were basically two types of courts in Nigeria prior to the Independence in 1960, the English courts and the Native Courts which were also of various forms: the *Alkali* courts in the North, the Customary courts in the South and the Mixed courts which could be found everywhere in the country. Brooke Commissions of Inquiry reported an average of 550,000 annual case load for the Native Courts in the country, 1,500 for the Supreme courts and 40,000 for the Magistrates¹⁰⁰. The report regretted that there were congestions in the two types of English courts. In discussing the function of Native Courts during the period, we hereby examine the jurisdiction of the

courts, laws administered in them, and a comparative analysis of cases they tried from region to region on the one hand and between them and the English courts on the other. We also provide the statistics of punishments ordered by the courts.

Native Courts were to deal with offences against the person while English Courts were to deal with offences against public order¹⁰¹. This arrangement suggests that theoretically, native courts were to exercise civil jurisdiction as English Courts were to exercise criminal jurisdiction but practically, both civil and criminal jurisdiction cut across the two types of court. According to 1914 Interpretation Ordinance, a Native court was given no jurisdiction over a Non-Native even in civil causes. Similarly, some natives who were government servants were not amenable to a Native Court except with their own consent, or that of the Lieutenant-Governor in criminal cases or of the Resident in civil cases¹⁰². Jurisdiction *ex-personae* of Native Courts was thereby limited to a class of natives and not all natives. According to section 3 (1) of 1915 Ordinance of Native Courts, Jurisdiction *ex-personae* of the Courts covered 'persons who have ordinarily been subject to the jurisdiction of native tribunals and reside or are within the area of Jurisdiction of the court'. That notwithstanding, every native court was reported to have had full jurisdiction and power:

to the extent set forth in its warrant, and subject to the ordinance in all civil and criminal cases in which all the parties belong to a class of persons who have ordinarily been subject to the jurisdiction of native tribunals¹⁰³.

These provisions indicate that jurisdiction *ex-personae* of each court should not exceed the limit set forth in the warrant establishing it, while jurisdiction over causes and matters overlaps from civil to criminal as might be set forth in the same warrant of the court's establishment.

Laws of administration in Native Courts were in varying grades and degrees. They include the territorial native law and custom, subject to the repugnancy clause; English Ordinances as the court might be directed from time to time to enforce, and the rules and orders made by the Native Authority¹⁰⁴. It was explained that Native law and custom included the *Shari'ah* 'as modified by local custom in the Muslim Emirates'¹⁰⁵ and in this regard the Commissions of Inquiry recommended that 'Yoruba Mohammedans in the Northern Region' might go to 'the *Alkali's* Court or to the Mixed Court'¹⁰⁶. Further discussions on basing law of administration in Native Courts on territorial grounds on the one hand and recognising the *Shari'ah* as native law and custom on the other hand are

contained in Chapter Five of this work but meanwhile it should be noted that both have caused a number of confusion which convinced us to suggest that there is a dire need for their review.

Relevance and importance of Native Courts to Nigeria can be evaluated in terms of annual case load tried in such courts. In the three principal towns of the colony, (Badagry, Epe and Ikeja), total number of cases handled in 1948 and in 1949 were as follows:

Table VI: Civil and Criminal Cases in the Colony: 1948 and 1949

Cases and Year	Badagry	Epe	Ikeja	Total
Civil Cases (1948)	713	615	800	2,128
Criminal Cases (1948)	576	1,126	1,286	2,988
Total (1948)	1,289	1,741	2,086	5,116
Civil Cases (1949)	881	686	877	2,444
Criminal Cases (1949)	756	1,265	1,398	3,419
Total (1949)	1,637	1,951	2,275	5,863
Grand Total (1948 and 1949)	2,926	3,692	4,361	10,979

Source: *Report of the Native Courts (Colony) Commission of Inquiry 1952 p. 20*

In the Western Region, Native Courts tried 101,029 cases in 1943; 104,705 in 1944; 105,338 in 1945; 110,542 in 1946 and 111,943 in 1947¹⁰⁷. In 1950, the Supreme Court in the Region tried 421 cases, the Magistrates' tried 14,174 while the Native Courts tried 104,229¹⁰⁸. In the Northern Region, Native Courts tried 62,121 criminal cases and 143,306 civil cases in 1939¹⁰⁹. The following table shows the statistics of cases tried in Native Courts of Nigeria in 1949.

Table VII: Criminal and Civil Cases tried in Nigerian Native Courts: 1949

Cases	Northern Provinces	Western Provinces	Eastern Provinces	Colony	Total
Criminal	85,708	34,494	44,399	3,419	168,020
Civil	240,536	69,757	92,884	2,444	405,621
Total	326,244	104,251	137,283	5,863	573,641

Source: *Native Courts Commissions of Inquiry 1949 to 1952: Appendix and Summary of Conclusions and Recommendations 1953, p. 91*

In 1949, there were 1,035 criminal and 1,417 civil appeals in the North, 517 criminal and 1,901 civil appeals in the West, 1,082 criminal and 3,358 civil appeals in the East, and only one criminal and one civil appeals in the Colony. In the same year, 587 criminal and 286 civil cases went under review in the North; 742 criminal and 761 civil cases in the West; 4,321 criminal and 10,078 civil cases in the East; and 127 criminal and 217 civil cases in the Colony¹¹⁰.

Punishments were meted out to people convicted by the Courts. There was a total record of 159,959 of such punishments in Nigeria in 1949. The North recorded 86,061, the West, 36,674, the East, 33,837 and the Colony 3,387¹¹¹. The North recorded a total increase of 23,483 punishments in ten years since in 1939 it had a total of 62,578 punishments¹¹². The increase in crime in the Region might not be unconnected with the abrogation of Islamic penal law which often served as deterrent to would-be criminals.

2.2.5 *Shari'ah* Penal Law in Native Courts

Legal harmony which was the goal of the British rulers in Nigeria and which is still being pursued by a group of legal and judicial administrators in the present Nigeria has been having some adverse effects on the *Shari'ah*. Such effects were more pronounced in criminal than in civil matters. Before we discuss the effects on Islamic penal law, we hereby illustrate the effect on civil matter with *M. Abba v. Marry T. Baikie* (1943) which is a Mixed-cause case on Islamic law of inheritance. It is illegal under Islamic law of succession for two people of different religions to inherit each other¹¹⁴ and Marry was thereby disallowed from inheriting the property of her Muslim father by the *Alkali* Court. On appeal to the Supreme Court, the decision of the *Alkali* Court was set aside on the ground that Islamic law in this regard was repugnant to natural justice, equity and good conscience¹¹⁵.

The reason given against Islamic law in the above example notwithstanding, some of the British officials recognised the adequacy of Islamic law in many other instances as applied in the North. Lugard¹¹⁶ maintained that the form of punishment to be inflicted for crimes should be 'that which is most deterrent and most likely to suppress crime'. Furthermore, the Chief Commissioner reported in 1937 that in *Alkali* Courts 'Justice is as efficiently administered as in courts where modern procedure and practice exist'¹¹⁷. Instead of practising a parallel legal system, the colonial rulers went ahead with the modification of law to be administered in Native Courts so that the judges could deal with other Islamic cases. One would

initially feel that local harmony was being pursued with genuine intention of uniting Nigerians irrespective of differences in religion and culture, but the following extract from the Report of Brooke Commissions of Inquiry¹¹⁷ has given the actual intention of the British rulers:

It appears to have been accepted that there would ultimately be one criminal code for the whole of Nigeria and that English Commercial law would take the place of Mohammedan sic and other customary law on the subject.

The plan was therefore to superimpose English Criminal and Commercial laws over all other existing laws in the country. Should unity of the country be the motive behind this plan, we still believe that tradition is difficult to change; for even if the British government has succeeded to a large extent in forging legal harmony, yet the recent demands for application of Islamic law in Nigeria vindicates our assertion. Details of such demands for the application of *Shari'ah* law are contained in Chapter Five of this work.

In order to achieve the goal of abolishing *Shari'ah* law in Nigeria, efforts of British researchers on Nigerian legal system during the colonial period were concentrated on cases of homicide and other *Hudud* cases with the view to discredit Islamic penal law. Prof. J.N.D. Anderson devoted many pages of his *Islamic Law in Africa* to the citation of a number of homicide cases decided in Northern Nigeria; such that were either quashed or retried by the Supreme Court (which applied English Criminal Codes).¹¹⁸ The research works revealed a number of conflicts between English Criminal law and Islamic penal law¹¹⁹. For example, Islamic law provides for the payment of blood-wit (*Diya*) in some talion cases but the English law has no provision for such. With the confusion in the Nigerian legal system as caused by the introduction of English Criminal Codes, the new codes had been attempting to replace the old laws under the pretext of forging legal harmony in the country. The next section discusses the position of Islamic law in post-colonial era of Nigeria.

2.3 *Shari'ah* in Post-Colonial Era

With the advent of British rule in Nigeria, Lugard did not only realise the efficacy of Islamic penal law as discussed above but also admired the Islamic commercial law and the way debtors were dealt with in Sokoto¹²⁰. He equally marvelled at how slaves were allowed to sue and be sued in Sokoto, unlike in Zanzibar where they were treated differently¹²¹. It thereby became clear to him that religion could play a significant and

appreciable role in law¹²². Consequently, he directed that judges should be appointed from persons professing the predominant religion in the area of jurisdiction of a Native Court, and that in cases where litigants belonged to two different religions, Provincial Courts could decide the case¹²³. Furtherstill, the 1953 Commissions of Inquiry discovered that legal harmony could cause confusion. It thereby recommended a parallel legal system for the country¹²⁴.

Muslim rulers were equally apprehensive of the inherent evil in legal harmony and they were consistent throughout the British rule in their call for non-interference with the *Shari'ah* by the colonialists. Evidence before the 1953 Commissions of Inquiry showed their:

- a. opposition to the withdrawal of jurisdiction in homicide cases from the Emir's Court exercising it,
- b. unwillingness to administer any law except Mohammedan law in Muslim Courts, and
- c. desire to retain Mohammedan practice and procedure even when the courts are enforcing Nigerian Ordinances¹²⁵.

They agitated for the administration of the *Shari'ah per se* and they insisted that even in a case where both the Islamic and English laws were concurrently applicable, they would prefer to apply the *Shari'ah*¹²⁶.

In spite of the foregoing evidences in support of the *Shari'ah*, the British colonialists still went to set in motion, a number of machinery to abolish the Islamic penal law in Nigeria as earlier discussed and as further discussed below. They monitored the Independence laws of the country to favour their legal system; and through their trained legal and judicial officers, efforts were geared towards further limiting the scope of Islamic law, if it cannot be totally scrapped. This part of the chapter hereby examines the position of Islamic law in the post-Independence Nigeria under two stages:

- i. The period within which the Independence laws of the Nigerian Regions were written and applied prior to the first military rule (1956-1966), and
- ii. The reforms introduced into the legal system with the advent of the military rule prior to the second Republic (1967-79).

2.3.1 Position of the *Shari'ah* Prior to 1967

Prominent among the features of Macpherson Constitution which came into force in Nigeria in 1951 was the power it provided for Regional Legislatures to make laws in respect of

‘a limited number of subjects which were specified in a schedule to the Nigeria (constitution) order in council, 1951¹²⁷. The defect of this constitutional provision was soon detected and in 1954, a new constitution which conferred more powers upon the regional legislatures was produced. Subsequently, many laws were enacted by each region of Nigeria. In Northern Nigeria, Native Courts Law, with both criminal and civil jurisdiction was enacted in 1956¹²⁸ while in Western Nigeria, Customary Courts Law which established four grades of such courts was enacted in 1957¹²⁹. Earlier, the judiciary of Northern Nigeria, based on the English system, had been established in December 1955 consequent upon the Nigerian constitution of 1954 which set up three separate regions¹³⁰.

Judicial history of Nigeria is closely connected with its political history since a good judiciary is essential for the peaceful development of any country. It has been viewed that an impartial ‘and efficient judiciary ensures the individual’s personal security¹³¹ and this, we feel, is very essential for any peaceful community. Because the political leaders in the three regions of Nigeria had wanted to live together in peace, they individually made adequate legal preparations for the independence in 1960.

In Northern Nigeria where *Shari’ah* legal practice was flourishing, delegations were sent to Libya, Pakistan and the Sudan ‘to see how countries with diverse populations and religious beliefs’ were ‘administered after the attainment of self-government with particular reference to the legal system¹³². The delegations were led by Etsu Lapai and Shettima Kashim. Their reports were considered by the Northern Nigerian government and subsequently, a panel of six men comprising three Nigerians and three non-Nigerians was set up under the Chairmanship of Sayyed Mohammed Abu Rannat, the Chief Justice of the Sudan. Other members of this panel of eminent jurists were:

- i. Mr Justice Mohammed Sherif, the Chairman of the Pakistan Law Commission,
- ii. Prof. J.N.D. Anderson of the School of Oriental and African Studies, London,
- iii. Shettima Kashim, the Waziri of Borno,
- iv. Mallam Musa Othman, the Chief Alkali of Bida, and
- v. Mr Peter Achimugu, from Kabba Province.

This panel of four Muslims and two non-Muslims was given the following terms of references:

In the light of the legal and judicial system obtaining in other parts of the world where Moslem and non-Moslem

live side by side, and with particular reference to the systems obtaining in Libya, Pakistan and the Sudan, to consider:

- a. the systems of law at present in force in the Northern Region, that is, English law as modified by Nigerian Legislation, Moslem law and Customary law, and the organisation of the courts and the judiciary enforcing the systems, and
- b. whether it is possible and how far it is desirable to avoid any conflict which may exist between the present systems of law;

and to make recommendations as to the means by which this object may be accomplished and as to the reorganisation of the courts and the judiciary, in so far as this may be desirable¹³³.

The panel had its first sitting on 28 August, and submitted its report on 10 September 1958. Many recommendations were made in the Report and the Government accepted almost all the recommendations except for some reservations on few items. Most of the recommendations show unequivocally that legal harmony was uppermost in the mind of the panelists since their proposals on the organisational structure of the courts as well as their civil and criminal jurisdiction turned out to be a compromise between the *Shari'ah* and other laws; whereas according to E.H. Ofori-Amankwah¹³⁴ the panel had three options on what to recommend to the Government:

- a. hundred per cent Western, or
- b. at the other end of the spectrum, hundred per cent Islamic, or
- c. a hybrid, compromised formula.

Notable among the panel's recommendations which were accepted by the government without reservations are:

- i. The application of Islamic law *per se* 'should be confined to the law of personal status and family relations, and when applicable, to civil cases'. Not only that; 'other civil litigations...would be dealt with...under statute law, customary law, or the law under which the parties concluded their contract'¹³⁵.
- ii. The introduction of a Panel Code and a Code of Criminal Procedure 'based on the Sudan Codes'¹³⁶. Many other recommendations like disallowing legal practitioners in the lower courts and increase in the salaries of the *alkalai* were made.

The concluding part of the White Paper on the Report reads:

The Regional Government is confident that the reforms now proposed will meet all past criticisms and dispel the fear expressed by minorities about the administration of justice in Native Courts in the Northern Region. Furthermore the government is satisfied that there is nothing repugnant to Islam in these reforms but that, on the contrary, their introduction without delay is essential if the region is to avoid internal disputes, live in harmony with the rest of the federation, and gain international acceptance after independence for its judicial and legal system¹³⁷.

This conclusion has revealed two things:

- i. That Northern Region Government was genuinely keen on allaying the fears of the minorities who were mostly non-Muslims in the Region and that the Government functionaries actually wanted to promote peace;
- ii. The assertion that 'there is nothing repugnant to Islam in these forms'.

The first revelation is more of political policy than judicial and may warrant little or no comment from us. The second revelation however, deserves an academic review, most especially with the panel's recommendation on the Penal Code and the Criminal Procedure Code.

The penal was surely influenced by many factors to recommend a Penal Code for the Region. First, the complaints of the minorities who were mostly governed by their respective 'native law and custom' and the Criminal Code. Second, 'to avoid internal disputes and live in harmony with the rest of the Federation'. Third, 'for the Region to gain international acceptance after the independence'. We are inclined to observe that these three reasons are frivolous, because the minorities were governed by their own native law and the English codes – not by the *Shari'ah*; and the application of the *Shari'ah* in the North could not have caused any riot in the entire federation as it had not caused it till that time. The question of international recognition of the legal and the judicial systems of the North as raised in the report is intriguing. It was possibly smuggled into the report to castigate the Muslims that the *Shari'ah* would not be internationally recognised. Perhaps, the only tenable reason could have been the success of the Penal Code in many of the countries to which it was introduced as discussed below.

The recommended Penal Code was fashioned after the Penal Code introduced into the Sudan in 1899. The code of the Sudan was modelled closely upon the Indian Penal Code which was drafted in 1834 by the first India Law Commission under the Chairmanship of Lord Macaulay but which could not become

operative until 1860¹³⁸. What attracted the Panel on Northern Nigeria Law Reform to the Indian/Sudan Penal Code was an observation of Richardson that since the introduction of the Code to India, conflicts between English, Hindu, and Islamic Laws became minimised¹³⁹. Furthermore, the substantive criminal law of other countries like Pakistan, Ceylon (now Sri Lanka), Burma, Malaysia, Singapore, Aden and the Arabian/Persian Gulf were models of the Indian Penal Code, though with local modifications. In addition, the Penal Code of India was seen to be more humane in punishment than Islamic and English laws. It provided moderate punishments of fine and imprisonment as against death penalty or mutilation for some crimes. Richardson noted that the Code was 'in sharp contrast to the English Common Law of 1834, which still prescribed the death penalty for a wide range of offences, and especially for stealing¹⁴⁰.

The introduced Penal Code to Northern Nigeria is better than the Criminal Code because the former contains some Islamic offences as well as some aspects of the latter – a unique feature which should make it suitable for both the Muslims and the non-Muslims. In order to make the Penal Code acceptable to the Muslims, its draft was put before a committee of Muslim jurists headed by Mallam Junaidu, the Waziri of Sokoto, for scrutiny between January and May 1959¹⁴¹. It was thereafter published in July the same year and it passed through both Houses of the Legislature in August. It finally became law on 26 September 1959. The penal code law 1959 (Commencement) notice of 30 September 1960 (N.R.L.N. 96 of 1960) made the code operative as from 1 October 1960. The code, though originally regional, later became part of the recognised laws of Nigeria; hence the penal code (Northern Region) Federal Provisions Ordinance, 1960 (No. 25 of 1960) re-enacted the provisions of the penal code law (No. 18 of 1959) with Federal offences¹⁴².

It was expected that the penal code would satisfy the diverse population of Northern Nigeria with its compromising nature since hitherto, 'the precise relationship between customary criminal law and the criminal code' remained vague and ill-defined as pointed out by the Supreme Court in *Maizabo v. Sokoto Native Authority*¹⁴³. The Supreme Court observed how unsatisfactory it was to require that native courts should decide guilt under native law and custom and then turn to the code for guidance on sentence¹⁴⁴. This anomaly was partially rectified by the penal code because native court judges were no more to decide criminal cases with the native law and custom. However, the new code prescribed non-Islamic penalties for

the listed Islamic offences. This sort of compromising Islamic with non-Islamic laws has further narrowed the scope of the applicable Islamic law in the region since hitherto, Islamic penalties were awarded but henceforth, the award of such penalties became illegal. This has shown clearly that hardly can legal harmony satisfy every group of different laws in a nation.

The 1958 panel of jurists which recommended the penal code suggested that non-Muslims could opt out of trial by Muslim court as Muslims could opt out of trial by non-Muslim courts¹⁴⁵. However, with the abolition of Islamic penalties by the penal code, we can see no more Muslim courts *per se* out of which the non-Muslims could opt! Furthermore, the Islamic criminal procedure had been abolished by another recommendation that native courts should be guided by the criminal procedure code¹⁴⁶. Other than whipping, nothing of the Islamic penal law thereby remained in the Northern Nigeria laws. What remains is a mere list of Islamic offences which have been rendered ineffective with the abolition of both the Islamic penal procedure and the real Islamic penalty.

The penal code was designed for application in the Magistrates' Courts, the High Courts and the native courts. The *Shari'ah* Court of Appeal could not apply the code because its jurisdiction was limited to only a few number of civil cases. To facilitate a quick understanding of the code by the Native Court judges, it was translated into Hausa¹⁴⁷. In the light of all the foregoing, the Northern Nigerian Government's statement that there was 'nothing repugnant to Islam in these reforms' is therefore unfortunate. How can there be nothing repugnant to Islam in the abolition of some aspects of the *Shari'ah* law in both the criminal and civil spheres?

Government efforts were geared towards training the indigenes of Northern Nigeria in English legal and judicial systems so that indigenous personnel could be provided to administer justice in the High Courts and the Magistrates' Courts. The government set up a special course at the Institute of Administration, Zaria, and at least twelve specially selected northerners were given special coaching every year in the institute before proceeding to London for the completion of their law course¹⁴⁸. On their return from London, some were appointed Magistrates on a salary of £720 (₦1,440) per Magistrate per annum. After two years, a Magistrate's salary would rise to £1,020 (₦2,040) per annum. Such a Magistrate could, with time, rise to the post of a Chief Magistrate with a salary of £2,292 (₦4,584) per annum or a Chief Registrar with

£2,492 (₦4,984) per annum. He could further rise to the post of a High Court Judge on an annual salary of £2,940 (₦5,880) or the Chief Justice on £3,540 (₦7,080) per annum¹⁴⁹.

With the independence in 1960, the recommendations of the Northern Nigeria law reform panels became law for the region. Among the highlights of the new law are: i. the establishment of Provincial Courts and, ii. the creation of an Inspectorate Division for Native Courts¹⁵⁰. Towards the plan of eliminating Islamic penal law in Nigeria at large, one of the resolutions adopted at the 1958 constitutional conference that 'no person shall be tried for a criminal offence except for an offence which is codified under a written law'¹⁵¹ was incorporated into the laws of the federation. Not only that, a judicial service commission was established for each region¹⁵².

In 1962, members of the legal and judicial reform panel in Northern Nigeria were re-invited to review their recommendations after about three years of application¹⁵³. The panel expressed happiness on the implementation of its recommendations but noted with dissatisfaction that:

- i. criminal jurisdiction was in the hands of 'some illiterate judges' and
- ii. 'there were still a few instances where the old ways were being deliberately adhered to, in a manner obstructive to progress, and it was recommended that the government should take a very strong line where such cases come to light'¹⁵⁴.

A total of 752 Native Courts were in Northern Nigeria as at 17 May 1962. They comprised 25 Emirs' Courts, 23 Chief Alkalis Grade 'A' Limited, 214 Grade 'B', 261 Grade 'C' and 229 Grade 'D' and the Report did not specify where the above two criticisms emanated. The following table shows the break-down of the courts on provincial basis:

Table VIII: Native Courts in Northern Nigeria: May 1962

Province	Emir's Court	Chief Alkali's	Grade B Court	Grade C Court	Grade D Court	Total
Adamawa	2	1	13	12	17	45
Bauchi	5	4	37	10	10	66
Benue	-	-	33	16	74	123
Borno	3	2	2	33	1	41
Ilorin	1	1	5	18	29	54
Kabba	-	-	11	33	-	44
Kaduna	-	-	3	-	1	4
Kano	4	4	33	2	-	43
Katsina	2	2	20	2	-	26
Niger	2	2	19	25	1	49
Plateau	-	1	9	36	52	98
Sardauna	1	2	5	12	19	39
Sokoto	4	3	21	35	2	65
Zaria	1	1	3	27	23	55
Total	25	23	214	261	229	752

Source: NN Laws Cap. 78 pp.941-974

The reconvened panel of jurists finally recommended among many other things:¹⁵⁵

- i. The organisation of a one-year Diploma Course for Native Court judges at the Institute of Administration in Zaira;
- ii. Improving the Salary of judges who may be holding such Diploma Certificate of the Institute;
- iii. Guidance of the Native Courts by the Criminal Procedure Code to continue and that some basic provisions of the Evidence ordinance be selected and made binding upon them;
- iv. Native Court Inspectors should work towards the codification of native law and custom;
- v. Reduction in the number of native courts to allow for the appointment of adequately trained judges (that is the magistrates);
- vi. Writing a Civil Procedure Rule; and
- vii. Equating the jurisdiction of magistrates' courts I, II and III with that of native courts grades B, C, and D respectively in the application of the Criminal Procedure Code and the Penal Code.

On the basis of these recommendations, Northern Nigeria delegates to July 1963 All Party Constitutional Conference

held in Lagos were fully aided with proposals on the necessary reforms for the Federal Republican Constitution on the one hand and the Northern Region Constitution on the other hand.

The 1963 constitution came into force on 1 October 1963. It contained many recommendations of the All Party Conference of July 1963. For example, sections 120 and 121 of the Independence Constitution of the Federation were deleted and the Judicial Service Commission became abolished. Similar Commissions at the regional level were equally abolished and each region was empowered to establish a regional court of appeal if so wished¹⁵⁶. In Northern Nigeria, Native Court Judges became public officers in the Public Service of the Region and they were thereby appointed by the Public Service Commission as a result of these republican reforms¹⁵⁷. Still, Native Courts continued to be the busiest courts of law in the Region and cases of Islamic interest were dominating. In 1964, only 161 of the total 2,345 appeals from the Native Courts of Northern Nigeria lay in the High Court by virtue of being criminal cases while others were determined according to Islamic law¹⁵⁸.

The image of Native Court judges was however dented during the period. They were accused of corruption, inefficiency, abuse of power and many other uncomplimentary behaviour. The major cause of such a dented image can be identified as the political inclination of the judges who had no option other than to dance to the tunes of the political party that was in control of the Native Authority since, as at that period, the judges received their salaries from the Native Authority. Furthermore, the police and the prison officials were also under the control of the same Native Authority. The political party in control of the government seized the opportunity of its power over the judges, the police and the prison at the local level to harass, intimidate and oppress their political opponents¹⁵⁹. When the military seized power in Nigeria with the 1966 coup, the judiciary became the first area of attack by the rulers. Major Nzeagwu Kaduna ordered the immediate closure of all native courts in the North barely four days after the coup which brought the military into power¹⁶⁰. We directed that all cases in such courts should be transferred to the Magistrates' Courts. The directive could not be effected because there were no sufficient magistrates' courts in the Region to take over the functions of native courts¹⁶¹. Major Nzeagwu thereby withdrew his earlier directive and left the native courts in a *status quo*. Should there be enough facility for his order to be effective in this regard, Islamic law would have been put into oblivion in Nigeria.

2.3.2 *Shari'ah* Reforms Prior to the Second Republic

Soon after the military came into power in 1966, a Study Group, headed by Justice Muhammad Bello (now the Chief Justice of the Federation) was commissioned to study the viability or otherwise of Native and Customary Courts in Nigeria. The study group completed its assignment and submitted its report on 28 May 1966¹⁶². The report reveals the following items among many others:¹⁶³

- i. That the greater majority of civil cases in Northern Nigeria were governed by Islamic law.
- ii. That the returns of 1964 showed that 'Native courts tried 223,262 cases as against 1,961 tried by magistrates' (Districts) courts'.
- iii. That for magistrates to take over the function of native court judges in this regard, not less than 1,861 magistrates would be needed whereas there were, by then, only three lawyers knowledgeable in Islamic law in the region.
- iv. That 'Native Courts try about 95 per cent of criminal and civil cases in Northern Nigeria and only 5 per cent are tried in the High and the Magistrates Courts'.

The Military Government studied the report and became convinced that native courts should not be scrapped. However, it decided to take them over from the Native Authorities¹⁶⁴.

There was another military coup in the country on 29 July 1966, hence the reforms introduced after the consideration of the Report of Bello Study Group could not be much pronounced until after 27 May 1967 when the country was divided into twelve states by the promulgation of states (Creation and Transitional Provisions) Decree, 1967¹⁶⁵. With this development, each state inherited the applicable laws in its region prior to the creation of the state¹⁶⁶. Each state in the North thereby enacted Area Courts Edict in 1967, most of which became operative in 1968¹⁶⁷. In the edicts, all native courts were taken over by the respective state governments while the control of the courts and judges was put under the Chief Justice of the respective states¹⁶⁸. Furthermore, Native Courts changed name to Area Courts while Provincial Courts became Upper Area Courts among many other changes¹⁶⁹. The pattern of the courts' operation and function did not change much, compared to what was hitherto in operation. For example, there were 141 Area Courts, 5 Magistrates' Courts and one High Court in North Eastern State as at 1968¹⁷⁰ and these were mostly the courts that had been existing in the Provinces which were merged to

form the State. Islamic law continued to govern the cases as limited in the edicts until 1975 when the third military rule considered it wise to reform the Area Courts once again.

In early 1976, Late General Murtala Ramat Muhammad set up a reform committee on Area Courts with a well-defined terms of reference among which was 'whether the jurisdiction of Area Courts in trying criminal cases should gradually be phased out so as to leave them with civil jurisdiction only'¹⁷¹. There were not less than eleven items in the terms of reference which focused on whether or not the Area Courts should continue to exist. The committee which was headed by Dr Aliyu Abubakar, the then Commissioner for Education in Bauchi State, submitted its Report dated 23 July 1976 to General Olusegun Obasanjo, the successor to Late General Murtala Ramat Muhammed who had been assassinated in a coup attempt. Other members of the committee with their post as at the time of their appointment are:

- i. Alhaji Haliru Binji, the Grand Kadi of Sokoto State.
- ii. Mr Justice Saidu Kawu, the Chief Justice of Kwara State.
- iii. Mr J. Orshi (Retired), the Secretary to the Military Government of Benue State.
- iv. Mr Justice Bashir Wali, the Attorney-General of Kano State.
- v. Dr Suleiman Kumo, the Director of the Institute of Administration, Ahmadu Bello University, Zaria.
- vi. Dr S. N. Nwabara, the Director of the Institute of African Studies, University of Nigeria, Nsukka; and
- vii. Alh. Usman D. Bungudu, the Attorney-General of Sokoto State.

Mr K.A. Aroyewun, the Chief Registrar of the High Court, Kaduna, served the Committee as secretary while Suleiman Nuhu, an Area Court Inspector also in Kaduna assisted him.

Report of the Committee indicated that there were 769 Area Court judges, 50 Magistrates, 19 High Court judges and 23 Kadis of the *Shar'ah* Court of Appeal in the Northern States by that time¹⁷². This confirmed the viability of the Area Courts, as revealed by the report of 1966 Bello Study Group. The Report reiterated further that in 1975, not less than 94 per cent of total cases tried in the Northern States were handled by the Area Courts: 25,977 cases were tried by the High/Magistrate/District Courts while 454,610 cases were tried by the Area Courts¹⁷³. The report therefore recommended the continuation with the Area Court system in the North because it is inexpensive, speedy, and uses the simple language devoid of cumbersome technicalities¹⁷⁴. The report observed that 'the

Area Courts are the most important set of judicial tribunals which serve the overwhelming majority of the population and with which the population are most acquainted¹⁷⁵. An analysis of the report is contained in Chapter Three of this study. Although the report did not call for a parallel legal system, its recommendations could go a long way in improving upon the area courts system if carefully implemented. For example, it recommended that all appeal cases pertaining to Islamic law be transferred to the *Shari'ah* Court of Appeal from the High Court but this has not been implemented till the present time.

In September 1976, the Federal Military Government under the leadership of General Olusegun Obasanjo set up a fresh reform committee on the Customary Courts system in Nigeria with some terms of reference which were identical with those of Area Courts Reform Committee which had earlier submitted its Report in July of the same year. Twelve items were listed as terms of reference for the committee and consequent upon the submission of its Report, a White Paper was published in 1978. Federal Government White Paper on the Customary Courts Reform Committee indicated that legal practitioners were neither recommended to practice in Customary Courts nor should they be appointed presidents or members of the Court and the Government accepted the recommendation¹⁷⁶. It was also recommended that a Customary Court should serve 50,000 people but, the government had its reservations on this recommendation¹⁷⁷. The last recommendation of the Committee States that 'No case has been made for the establishment of Muslim Courts in areas where there are Muslims in the Southern parts of Nigeria', ¹⁷⁸ and the Government accepted it without any reservation! The implication of this recommendation on the application of Islamic law in Southern Nigeria is discussed in Chapter Five of this work. Meanwhile, position of the *Shari'ah* in the lower courts of record rested on the implementation of the suggested reforms as approved by the Federal Military Government from 1976 to date and this is discussed in detail in Chapter Three below. Further developments on the *Shari'ah* till 1979 and beyond affect, mostly, the superior courts in which appeals lay and these are discussed in the next section of this chapter, from a historical perspective.

2.4 *Shari'ah* Appeals in Nigerian Courts

Dispensation of justice is a delicate profession. It is required of a judge to be wise and erudite because a faulty judgement from him may lead to serious damages, not only to the convicted accused person but also to the entire members of

his family or even to the nation at large. The provision of appeal system to rectify the faults of lower courts is therefore valuable and important. Man is surely endowed with intellect but his reasoning faculty has its limitations, hence they say: 'Two good heads are better than one'. The appeal system is by and large the human attempt to reduce the effect of the limitation of the intellect to the barest minimum; for Allah is the only Perfect and Just Arbiter. The importance of appeal in the Nigerian judicial system can be illustrated by the following table.

Table IX: Results of Appeals Against Judgements in the Native Courts of Nigeria During 1949 by Regions

Region	Judgement Upheld	Order for Retrial	Judgement Modified or Annulled	Transfer to other Courts	Struck out	Total
Northern Provinces	1400	426	562	64	-	2,452
Western Provinces	904	93	1189	26	206	2,418
Eastern Provinces	2133	336	1961	15	-	4,445
Colony	-	-	-	2	-	2
Total	4437	855	3712	107	206	9,317

Source: *Native Courts Commissions of Inquiry 1949 to 1952. Appendix and Summary of Conclusion and Recommendations* p. 42

By way of analysis, all Native Courts in the country tried 573,619 cases out of which 9,317 went on appeal in 1949. The result of these appeals, as analysed in the table indicates that a total of 3,712, amounting to 40 per cent of 9,317 were either modified or annulled; should such a figure be for death sentences in a situation where there was no appeal system, it presupposes that 3,712 people would have died innocently due to faulty judgements! Islamic legal system recognises the importance of appeals. It established *Kazalim* courts which served as appeal courts under the control of the ruling Caliph or Governor¹⁷⁹. The Sokoto Caliphate thereby maintained the Islamic system of appeal prior to the advent of British rule in Nigeria¹⁸⁰. Based on the foregoing which reveals the importance of appeal system in any judicial set up, we hereby examine *Shari'ah* appeals in Nigeria under three stages: i. During the Colonial Rule; ii. under the Independence Laws and Prior to 1979; and iii. Under the 1979 Constitution, particularly in the (Federal) Court of Appeal.

2.4.1 *Shari'ah* Appeals During the Colonial Rule

Native Courts Proclamation (No. 5 of 1900) recognised the existing system of court organisation prior to the advent of British rule in the North. It therefore contained no amendment to the appeal system in *Alkali* Courts. Native Courts Proclamation (No. 1 of 1906) also gave no new provision for appeal 'and the English and Native Courts were run on parallel lines' except that in 1904, a Native Court judge was appointed to review sentences of all Native Courts¹⁸¹. The parallel judicial system continued until the promulgation of Native Courts Ordinance (No. 8 of 1914) which introduced the English system of appeal into the entire Native Courts of the Northern and Southern Protectorates of Nigeria. The same appeal system was re-enacted by the Native Courts Ordinance (No. 5 of 1918) which repealed the 1914 ordinance. In the two Ordinances of 1914 and 1918, though the introduced appeal system was English in structure, appeal from lower Native Courts lay in superior courts, and not in English courts. The integrated system of appeal by which cases from Native Courts lay in English courts was introduced with the 1933 reforms of Nigerian courts¹⁸².

Consequent upon 1933 reforms, the need arose for a superior court of appeal for cases of Islamic subject matter tried in the Native Courts; but the Government was in a dilemma as to the *modus operandi* of the needed court. Would it be a separate Muslim Court of Appeal *per se* or a compromised formula of 'a branch of the High Court of Appeal' – that is, a special division of the Supreme Court presided over by a British judge sitting with Muslim assessors?¹⁸³ There were arguments for and against each of the two formulas and the Emirs were unequivocal in demanding a separate Muslim Court of Appeal¹⁸⁴. When the Native Commission of Inquiry was set up, it received many letters from several other interested bodies on the establishment of a Muslim Court of Nigeria *per se*. According to Joseph Schacht,¹⁸⁵ 'extremist opinion would in fact like to make the projected Muslim Court of Appeal take the place of the West African Court of Appeal in all native cases'. Schacht and Anderson were both noted to have not favoured the establishment of a separate Muslim Court of Appeal; the former stated in his report¹⁸⁶ that 'the creation of a Muslim Court of Appeal is not recommended' while the latter believed that 'to set up such a court... would...be fatal; for it would not only cut right across the jurisdiction of the Supreme Court but would serve to perpetuate the privileged position of Islamic law in the North'¹⁸⁷. In the long run, Brooke Commissions of Inquiry recommended that:

There should be a Mohammedan Court of Appeal for Muslim cases consisting of a single judge with assessors chosen from a panel of assessors and sitting either as a special court of appeal or as a division of the Supreme Court. An appeal in such cases would be confined to a consideration of question of fact of Mohammedan law as raised by the appellant¹⁸⁸.

Eventually, Moslem Court of Appeal Law (No. 10 of 1956) was enacted to establish an Islamic court of appeal to hear appeals from Native Courts in the North, though its jurisdiction was confined to a number of civil cases¹⁸⁹.

Muslims actually won the establishment of a superior court of appeal to determine their cases but the established court was not the final court of appeal on such cases. Practically, appeals from the Moslem Court of Appeal could lie in the High Court of Appeal which comprised four judges – two from the English High Court and two others chosen from the Chief *Alkalai* in Northern Provinces¹⁹⁰. Appeals from this compromised higher court of appeal could lie in the Supreme Court, thence in the West African Court of Appeal for further determination. It should be noted that when such cases reached the Supreme Court or the West African Court of Appeal, or still the Judicial Committee of the Privy Council, Justices to decide them were not adequately knowledgeable in the *Shari'ah*. The limited knowledge of the *Shari'ah* possessed by some of them could have been acquired from the following books of Islamic jurisprudence which the British government had on many occasions encouraged its officers to learn:¹⁹¹

- i. *First steps in Muslim Jurisprudence* – a translation of parts of the *Risalah* of Ibn Abi Zayd;
- ii. *Perron's Jurisprudence Musalmane* – translated by Ruxton;
- iii. *Code of Khalil b. Ishaq called the Hedaya* – translated by Hamilton (W.H. Allen, London); and
- iv. *Code Musalman* by M. Seignette

That was how the appeal system of Northern Nigeria Courts began to witness confusion and crisis with regard to Islamic cases.

2.4.2 Appeal System in the Independence Laws with Particular Reference to the *Shari'ah*

The panel of jurists which considered reforms on legal and judicial system in Northern Nigeria recommended:¹⁹²

- i. The establishment of Provincial Courts which would be of the same status with Chief *Alkali's* Grade 'A' Limited Courts and which would function as appeal courts for

Grades B, C, and D Native Courts. The judges of such courts would be public servants appointed by the Judicial Service Commission.

- ii. The establishment of Native Courts Appellate Division of the High Court where two judges of the High Court and the Grand Kadi or his representative would determine appeals from Native Courts on Criminal cases and other cases of Islamic law *per se*. All the three judges would 'have an equal voice in the decisions of the court and the judge, considered to have the greatest knowledge of the law to be determined, would preside'.
- iii. The change in name of the Moslem Court of Appeal to *Sharī'ah* Court of Appeal.
- iv. That the composition of the *Sharī'ah* Court of Appeal should be the Grand Kadi, Deputy Grand Kadi, and two other Kadis all of whom should be permanent and regular members of the Court.
- v. That the quorum of *Sharī'ah* Court of Appeal Kadis to hear appeals should be three.
- vi. The confinement of *Sharī'ah* Court of Appeal's jurisdiction to only cases involving the personal status of the Muslims and the finality of the Court's decision.
- vii. The establishment of a Court of Resolution to solve the problem of jurisdiction between the *Sharī'ah* Court of Appeal and the High Court.

The Independence Laws of Northern Nigeria featured all the recommendations of the reform panel with regard to appeal of Islamic cases *in toto*. *Sharī'ah* Court of Appeal Law (No. 16 of 1960) was enacted to repeal the Moslem Court of Appeal Law (No. 10 of 1956). Native Courts (Amendment) Law (No. 10 of 1960) was also enacted to establish Native Provincial Courts. By these laws, appeals from Native Courts lay in the Provincial Court and thence in either the *Sharī'ah* Court of Appeal or in the Native Courts Appellate Division of the High Court which was established by the High Court (Amendment) Law (No. 14 of 1960). In the High Court's appellate sitting, three judges – two from the High Court and one from the *Sharī'ah* Court of Appeal should hear the case while the knowledgeable of the three judges in the law applied in the lower court on a particular case should preside over the sitting. By that arrangement, Islamic cases would be adequately catered for in the High Court Appellate Division. Should there be a conflict of jurisdiction between the High Court and the *Sharī'ah* Court of Appeal, a Court of Resolution was established to resolve the conflict. The

court was established by Court of Resolution Law (No. 17 of 1960) and it consisted of the Chief Justice of the High Court, the Grand Kadi of the *Shari'ah* Court of Appeal and a judge each of the High Court and the *Shari'ah* Court of Appeal nominated by the Chief Justice and the Grand Kadi respectively.

The relevant sections of the High Court Laws in the Laws of Northern Nigeria which allowed a Kadi of the *Shari'ah* Court of Appeal to sit with two other judges of the High Court Appellate Division was challenged by Mr J.S. Olawoyin in *Olawoyin v. Commissioner of Police I and II* (1961) and the Supreme Court declared the sections of the Laws null and void¹⁹³ because they were viewed to be inconsistent with the 1960 constitution of Northern Nigeria. After the judgement, no Kadi of the *Shari'ah* Court of Appeal could sit in the High Court Appellate Division and Islamic cases in the court were thereby exposed to danger of being tried by judges with little or no knowledge of *Shari'ah* law. It took the Premier of Northern Nigeria, Late Sir Ahmadu Bello, a considerable length of time to get the 1960 constitution of Northern Nigeria amended in favour of restoring the sitting of a Kadi in the appellate division of the High Court¹⁹⁴.

Still in 1961, Islamic law faced a repugnancy test of the English system and failed. In *Mariyama v. Sadiku Ejo* (1961), the Islamic law of *al-Walad li al-Firash* on paternity¹⁹⁵ was said to be contrary to natural justice, equity and good conscience¹⁹⁶. The lower court decided the case in accordance with Islamic law but on appeal, the Northern Nigeria High Court reversed the decision of the lower court. This case indicates that still with the independence, the colonial repugnancy clause continued to operate as it earlier operated on *M. Abba v. Marry T. Baikie* (1943).

The laws of Northern Nigeria, as reformed for the 1963 republic, were in operation until the military took over the governance of the country in January 1966 though the revised editions of the Laws could not be published until 1965. Still under the military, the adverse effect of legal harmony upon the *Shari'ah* continued to be felt. In 1968, the case of *Yunusa Rasaq v. Titi* which was decided in accordance with Islamic law of bequest by Justice Mohammad Bello in the High Court of Northern Nigeria (because the Justice was himself acquainted with the *Shari'ah*) was set aside by the Supreme Court¹⁹⁷ on the ground that the judgement was 'contrary to the provision of the Wills Act, 1837 which permitted everybody to dispose of his property as one liked even to his dog'¹⁹⁸.

The 1963 constitution of the federation empowered each region to establish a court of appeal to hear cases of aggrieved parties from the High Court of the Region as recommended by

the All Party Constitutional Conference of Lagos, 1963¹⁹⁹ but only Western Region established one by the constitution of Western Nigeria²⁰⁰. Other regions provided in their respective constitutions that the legislature could establish a regional court of appeal of that nature, yet, records show that none was established by the regions,²⁰¹ except the already existing *Shari'ah* Court of Appeal in the Northern Region. The Western Region did not appoint justices for its established Court of Appeal until 1 April, 1967 when it issued Court of Appeal (Commencement of Provisions) Notice,²⁰² and enacted the Court of Appeal Law (No. 15 of 1967). Since the *Shari'ah* legal system was not formally practised in the region, the established Court of Appeal was not for the *Shari'ah*. Appeals from the Customary Courts which were presided over by non-legal practitioners often lay in Customary Courts which were presided over by legal practitioners (that is Grades A and B) or in Magistrates' Courts in places where there were no such Grades A and B courts. Appeals from the Magistrates' Courts and the Customary Courts Grades A and B presided over by legal practitioners lay in the High Court, thence in the Court of Appeal. The Western Region Court of Appeal actually served Ogun, Ondo and Oyo States until 31 March, 1976 when it was abolished by section 3 (i) of the Constitution (Amendment) (No. 2) Decree (No. 42 of 1976) which established a national Court of Appeal for Western-oriented courts in the country.

2.4.3 *Shari'ah* in the (Federal) Court of Appeal

Northern Nigeria *Shari'ah* Court of Appeal continued to serve the six Northern States created in 1967 until it was partially decentralised. Three divisions of the court were established with each division serving two States. One division served Kaduna and Kwara States, one served Kano and North-Western States while the other served North-Eastern and Benue-Plateau States. The partial decentralisation was abolished in 1975 when more States were created and each Northern State appointed its own Grand Kadi and a number of Kadis for its *Shari'ah* Court of Appeal except Benue and Plateau States which shared only one *Shari'ah* Court of Appeal till the present time. With the plurality of *Shari'ah* Court of Appeal, it became desirable to establish a more superior *Shari'ah* Court of Appeal to which appeals from State *Shari'ah* Courts of Appeal would lie.

In 1972, the issue of establishing Federal Courts of Appeal was discussed at a Conference of All Nigerian Judges held in Lagos. Item 17 of the Communique issued at the end of the conference called for the establishment of (i) a Federal Court

of Appeal for the High Courts which could 'operate through four arms based in Lagos, Enugu, Kaduna and possibly Ibadan'²⁰³ and (ii) a Federal *Sharī'ah* Court of Appeal which would serve as a final appeal court for Islamic cases²⁰⁴. The Federal Government did not implement this aspect of the communiqué until 1976 when section 121 of the constitution of the Federation was amended by Constitution (Amendment) (No. 2) Decree (No. 42 of 1976) to establish a Federal Court of Appeal for only the High Courts²⁰⁵. Hitherto in 1975, Late General Murtala Muhammad had wanted to implement item 17 of 1972 Conference of All Judges *in toto* but he was confronted with some constraints²⁰⁶.

Muslims were not satisfied with the situation and they argued convincingly that the establishment of a Federal *Sharī'ah* Court of Appeal should be regarded as part of their fundamental human rights. The Constitution Drafting Committee which worked from 18 October 1975 to 14 September 1976 thereby proposed in its Draft Constitution the establishment of a Federal *Sharī'ah* Court of Appeal which would be composed of a Grand Mufti and three Muftis as judges²⁰⁷. When the Draft Constitution was approved for public debate, sentiments were introduced into the proposed Federal *Sharī'ah* Court of Appeal. Debates in form of open-air and close-door lectures, articles in newspapers, radio and television discussions focused on the proposed Federal *Sharī'ah* Court of Appeal. Later, a Constituent Assembly was set up by the Federal Military Government to produce a final copy of the Constitution. During the Assembly's sitting from 6 October 1977 to 29 August 1978, arguments for and against the same Federal *Sharī'ah* Court of Appeal continued with hot temper that at a stage, many favourities of the court's establishment had to protest by staging a walk-out on the assembly. Hitherto, on 1 November 1977, Chief Rotimi Williams who was the Chairman of the Constitution Drafting Committee had enlightened the Assembly on the importance of establishing a separate *Sharī'ah* Court of Appeal at the Federal level. He addressed the Assembly, pointing out the inadequacies of any compromised formula in this regard:

The possibility of having the *Sharī'ah* division of the Federal Court of Appeal, and or of the Supreme Court was considered and rejected by the majority of the members of the Constitution Drafting Committee. Such a solution will create more problems than it is intended to solve. The *Sharī'ah* division will not be a 'division' of the Federal Court of Appeal in the true sense²⁰⁸.

Before the return of the walk-out group to the Constituent Assembly, the remaining members who were mostly against

the establishment of the Federal *Shari'ah* Court of Appeal had created a division for the *Shari'ah* in the Federal Court of Appeal. They also created another division for Customary Law which was not proposed by the Constitution Drafting Committee²⁰⁹. Those in favour of a Federal *Shari'ah* Court of Appeal thereby became losers²¹⁰. Below are some relevant *Shari'ah* sections of the 1979 Constitution with particular reference to the (Federal) Court of Appeal:

- i. s.217 (2) (b): Such number of Justices of the Federal Court of Appeal, not less than 15, of which not less than 3 shall be learned in Islamic personal law, and not less than 3 shall be learned in Customary law, as may be prescribed by an Act of the National Assembly.
- ii. s.218 (3): A person shall not be qualified to hold the office of a Justice of the Federal Court of Appeal unless he is qualified as a legal practitioner in Nigeria and has been so qualified for a period of not less than 12 years.
- iii. s.219: Subject to the provisions of this Constitution, the Federal Court of Appeal shall have jurisdiction, to the exclusion of any other courts of law in Nigeria, to hear and determine appeals from the Federal High Court, the High Court of a State, *Shari'ah* Court of Appeal of a State and Customary Court of Appeal of a State.

The provision of a uniform qualification for all Justices of the (Federal) Court of Appeal by section 218 (3) of the Constitution seems desirable but the *proviso* that every Justice of the Court must be qualified as 'a legal practitioner' in the country has *ipso facto* disqualified a Kadi of the *Shari'ah* Court of Appeal or a Grand Kadi of many years' experience at the bench but who is not a qualified legal practitioner in Nigeria from being appointed a Justice of the (Federal) Court of Appeal to try Islamic cases. Consequent upon that and generally upon the creation of a division for the *Shari'ah* in the (Federal) Court of Appeal, many Islamic cases have suffered through the decision of both Muslim and non-Muslim Justices of the court. Such cases include, among others:

- i. *N. Ado, Hajia Rabi v. Hajia Dije* (1983),²¹¹
- ii. *Umaru Fannami v. Bukar Sarki* (1985),²¹²
- iii. *Karimatu Yakubu and Alhaji Mahmud Ndansu v. Yakubu Tafida Paiko and Alhaji Umaru Gwagwada* (1985),²¹³

These cases and many others are discussed in detail in Chapter Four. Meanwhile, *Shari'ah* legal practice in the lower courts is discussed in the next chapter.

Notes and References on Chapter Two

1. **Ali Abubakar**, *ath-Thaqafah al-ʿArabiyyah Fi Nayjiriya Min 1750 Ila 1960* *ʿAm al-Istiqlal*. Beirut: Muʿassasah ʿAbd al-Hafiz al-Basat, 1972 p. 64.
2. **J. S. Trimingham**, *A History of Islam in West Africa*. London: Oxford University Press, 1975 p. 109.
3. **Ali Abubakar** p. 52.
4. **J.S. Trimingham** p. 116.
5. **I.A.B. Balogun**, 'The Advent and Development of Islam in Nigeria' in *Al-ʿILM (knowledge)* Vol. VIII No. 2 December, 1978 p. 29.
6. **Ali Abubakar** p. 51.
7. **A.I. Doi**, *Islam in Nigeria*. Zaria: Gaskiya Corporation Limited 1984 p. 60.
8. **Ali Abubakar** p. 57.
9. *Ibid* p. 94.
10. **Humphrey Fisher**, 'The Western and Central Sudan' in *The Cambridge History of Islam* Vol. 2A ed. By P.M. Holt, Ann K.S. Lambton and Bernard Lewis. Cambridge: Cambridge University Press, 1977 p. 372.
11. **Adeleye Ijagbemi**, 'A Review of Louis Brenner's History of the Al-Kanemi Dynasty of Bornu' in *Research Bulletin* vol. 3 No. 1 January, 1967 p. 32.
12. **W.A. Brown**, 'A Monument of Legal Scholarship: the Nawazil ʿUlama' at-Takrur of al-Mustafa b. Ahmad al-Ghalawi' in *Research Bulletin* vol. 3 No. 2 July, 1967 p. 137.
13. *Nawāzil ʿUlamā' at-Takrīr* is a work of six volumes, running to more than 2,400 manuscript pages. It is a reference work on legal opinions of scholars on a variety of legal questions and 'a guide to the level of legal learning among the scholars represented therein' (Brown, 1967:137).
14. **J.S. Trimingham** p. 126.
15. **A.I. Doi**, p. 20.
16. **J.S. Trimingham** p. 128.
17. *Ibid* p. 130 ff
18. **A.I. Doi**, p. 20
19. **Humphrey Fisher**, p. 371
20. **J.S. Trimingham**, p. 107
21. For example, Ali Yaji of Kano appointed a *qadi* called Zalte during his reign (Trimingham, 1975 p.131).
22. **J.S. Trimingham** p. 132
23. Some came from North Africa, some from Kanem-Borno empire, while others came from Mali and Arabia (Humphrey Fisher, 197 p.357).

24. J.S. Trimingham, p. 133
25. Such as Trimingham, Doi, ʿAli Abubakar, etc.
26. A.I. Doi, p. 204
27. Doi even alleges that al-Maghili was the one who reconverted Ibrahim Kaje to Islam.
28. A.I. Doi p. 21
29. I.A. B. Balogun *op cit* p. 33
30. A.I. Dio, p. 205
31. I.A.B. Balogun, p. 33
32. Humphrey Fisher, p. 371
33. A.I. Doi, p. 109
34. I.A.B. Balogun, *op cit* p. 35
35. T.G.O. Gbadamosi, *The Growth of Islam among the Yoruba 1841-1908*. London: Longman Group Limited, 1978 p. 4
36. Titilola Euba, 'Muhammad Shitta-Bey and the Lagos Muslim Community (1850-1895)' in *Nigerian Journal of Islam* vol. 2 No. 1 July 1971-January 1972 p. 21
37. T.G.O. Gbadamosi p. 4
38. Ibid p. 20
39. Titilola Euba, p. 27
40. T.G.O. Gbadamosi, p. 57
41. *ibid.passim* eg. pp. 69, 70, 98 etc.
42. Titilola Euba, p. 22.
43. *ibid.* pp.24 & 29 (Note 31).
44. J.S. Trimingham, p. 212
45. Humphrey Fisher, p. 357
46. *ibid.* p. 356
47. J.S. Trimingham, p. 121
48. Humphrey Fisher, p. 358
49. *ibid.* p. 373
50. I. A. B. Balogun, *The Life and Works of ʿUthman Dan Fodio*. Lagos: Islamic Publications Bureau, 1975, p. 59.
51. A.I. Doi p. 205 ff.
52. J.S. Trimingham, *Passim*.
53. Ahmad Beita Yusuf, 'Legal Pluralism in the Northern States of Nigeria: Conflict of Laws in a Multi-Ethnic Environment', Unpublished Ph.D. Dissertation, State University of New York, Buffalo, 1976. p. 46.
54. Humphrey Fisher, p. 369
55. ʿAli Abubakar p. 93
56. T.G.O. Gbadamosi, p. 70
57. *ibid.* p. 67.
58. *ibid.* p. 58
59. *ibid.* p. 231
60. *ibid.* p. 102

61. *ibid. passim.*
62. *ibid.* p. 234.
63. Crown Lands Ordinance, 1918.
64. J. N. D. Anderson, *Islamic Law in Africa* London: Frank Cass, 1978 p. 179.
65. Lord Lugard, *Political Memoranda*. London: Frank Cass & Co. Ltd., 1970 p. 272.
66. *Report of the Native Courts (Colony) Commission of Inquiry (RNCCI)*. Lagos: Government Printer, 1952 p. 49.
67. *Native Courts Commissions of Inquiry: 1949 to 1952: Appendix and Summary of Conclusions and Recommendations, NCCI-ASCR*. Government Printer, 1953 p. 20 ff
68. *ibid.* p. 93.
69. For example, Lord Lugard extolled Islamic Law when prohibiting corporal punishment for women in Nigeria, Lord Lugard p. 289.
70. Lord Lugard, p. 89
71. *ibid.* p. 286
72. NCCI-ASCR p. 66
73. Lord Lugard, p. 268
74. D.O. Shittu, 'The Nigerian Draft Constitution and *Shari'ah* Controversy' in NATAIS No. 1, 1977 p. 114.
75. *ibid.*
76. *ibid.* p. 115
77. RNCCI, pp. 48 & 52
78. Sulaiman Kumo, 'Organisation and Procedure of *Shari'ah* Courts in Northern Nigeria' Unpublished Ph.D. Thesis, SOAS, University of London, 1972 p. 78.
79. Abdulmalik Bappa Mahmud, 'Brief History of *Shari'ah* in the Defunct Northern Nigeria' January, 1986 p. 13 ff.
80. *ibid.* p. 5 ff; A.I. Doi p. 213; and J.N.D. Anderson p. 222 ff.
81. NCCI-ASCR p. 44
82. Abdulmalik Bappa Mahmud, p. 11 ff
83. J.N.D. Anderson, p. 182 ff
84. Lord Lugard, p. 270.
85. NCCI-ASCR, op cit p. 71
86. J.N.D. Anderson, p. 191
87. Lord Lugard, p. 271
88. *ibid.*
89. NCCI-ASCR, p. 276
90. RNCCI, p.48
91. Lord Lugard, p. 266
92. NCCI-ASCR p. 30
93. *ibid.*

94. Lord Lugard, p. 293
95. *ibid.* p. 290
96. *Colonial Reports: Nigeria 1950 (CRN)*. London: His Majesty's Office, 1951 p. 72
97. *RNCCCI*, P. 49
98. Lord Lugard, p. 281
99. AbdulMalik Bappa Mahmud, p. 28 ff.
100. *NCCI-ASCR*, p. 67
101. Lord Lugard, p. 278
102. Native Courts Ordinance No. 15 of 1915; and Interpretation Ordinance 1914 – See *NCCI-ASCR* p. 86 and Lord Lugard, p. 2
103. *NCCI-ASCR* p. 86
104. *ibid.* p. 91
105. *ibid.*
106. *ibid.* p.71
107. *ibid.* p. 40
108. *ibid.* p. 77
109. *ibid.* p. 91
110. *ibid.* p. 110
111. *ibid.* p. 107
112. *ibid.* p. 36
113. Muhammad b. Islāḥ al-Kahlani, *Subul as-Salam* Vol. III NP: Dar al-Fikr ND p. 210
114. Abdulmalik Bappa Mahmud, p. 17. He was quoting / 20A/1943 – a Kaduna Court case.
115. Lord Lugard p. 89
116. *NCCI-ASCA*, p. 72
117. *ibid.* p. 74
118. The cases include *Borno Native Authority v. Yusuf and Dauna of Marte*; *Kano Native Authority v. Gwandai Bembem and Ahmadu Shokana*; *Katsina Native Authority v. Yakudi of Madaba and Dambaco of Rimage*; and *Adamawa Native Authority v. Kofi of Cike*. See J. N. D. Anderson *op cit* pp. 199 (n.5) & (n.1); and 200 (n.6).
119. J. N. D. Anderson has testified to such conflicts in his article 'Conflict of Laws in Northern Nigeria' published in the *Journal of African Law* 87. For details read, E.H. Ofori-Amankwah 'The Penal Code and the Criminal Code – Their Origin and Differences' in *Journal of Islamic and Comparative Law* Vol. 8, 1978.
120. Lord Lugard, *op cit* p. 279
121. *ibid.* p. 22
122. *ibid.* p. 94
123. *ibid.* p.286

124. NCCI-ASCR, pp. 67 & 68
125. *ibid.* p. 89
126. *ibid.* p. 92
127. Hedley Herbert Marshall and Frederick August Otto Schwarz ed. *The Laws of Northern Nigeria*, 1963. Vol. I NP: The Government of the Ten Northern States of Nigeria, 1980 p. vii.
128. No. 6 of 1956
129. W. R. N. Laws (1959) Cap. 31
130. *Guide to Careers I: Judiciary, a Career of Opportunity (GCJ)*. (No Publisher, no date and no place mentioned). P. 3
131. *ibid.* p. 16
132. *Statement by the Government of the Northern Region of Nigeria on the Re-Organisation of the Legal and Judicial Systems of the Northern Region (SGNRNRLJSNR)*. Kaduna: Government Printer, 1958 par. 1.
133. *ibid.* par. 3
134. E.H. Ofori-Amankwah, p. 52
135. *SGNRNRLJSWR*, par. 8
136. *ibid.* par. 7
137. *ibid.* par. 36
138. S.S. Richardson, *Notes on the Penal Code Law*, Zaria: Gaskiya Corporation, ND. p. 1
139. *ibid.* p. 2
140. *ibid.*
141. *ibid.* p. 3. Members of the Committee include: Alhaji Muhammad Bello, Walin Katsina; Mallam Musa, Chief Alkali of Bida; Alh. Jibrin Daura, Magatakardan Kano, Alhaji Muhammad Dodo Mustafa, Junior Alkali of Katsina; and Alh. Baba Kura – Alikali. The following two were co-opted: Shaykh ‘Awad Abdullahi and Mr. S. S. Richardson.
142. A.O. Obilade, *The Nigerian Legal System*. London: Sweet & Maxwell, 1979 p. 35 n. 57
143. N.R.N.L.R. 133
144. E.H. Ofori-Amankwah, p. 52
145. *SGNRNRLJSNR*, par. 9
146. *ibid.*
147. Abdulmalik Bappa Mahmud, p. 24.
148. *ibid* p. 30; and GCJ, p. 10
149. GCJ, p. 15
150. Abdulmalik Bappa Mahmud p. 29
151. *ibid.* p. 23
152. A.C. Obilade, p. 38
153. The panel which reconvened on 24 May and completed its assignment on 4 June 1962, deliberated without its former Chairman, Abu Rannat, who was unavoidably

- absent for ill-health.** (*Statement made by the Government of Northern Nigeria on Additional Adjustments to the Legal and Judicial Systems of Northern Nigeria.* 'SGNNAALJSNN' Kaduna: Government Printer, 1962 par. 3.
154. *ibid.* par 9
 155. *ibid.* pars. 10, 11, 14, 15, 17, 26 and 28.
 156. *Proposals for the Constitution of the Federal Republic of Nigeria (PCFRN).* Lagos: Federal Ministry of Information, 1963 pp. 8 and 11.
 157. A.O. Obilade, p. 39
 158. Sulaiman Kumo, p. 33
 159. *ibid.* p. 56; and Abdulmalik Bappa Mahmud, p. 30
 160. Abdulmalik Bappa Mahmud, p. 31.
 161. According to Abdulmalik Bappa Mahmud (p. 31), there were fifty Native Courts in Borno Province while there was no single Magistrate Court. He narrated further that the only Magistrate Court which was serving Plateau, Bauchi, Borno and Adamawa Provinces was located in Jos.
 162. Abdulmalik Bappa Mahmud, *op cit* p. 32
 163. *ibid.* and *Report of the Area Courts Reform Committee, 1976 (RACRC).* Lagos: Federal Ministry of Information, 1976 p. 10
 164. Abdulmalik Bappa, Mahmud, p. 32
 165. No. 14 of 1967
 166. A.O. Obilade, p. 42
 167. An example of Kwara State Area Courts Edict, 1967 (No. 2 of 1967).
 168. Sulaiman Kumo, p. 57
 169. Abdulmalik Bappa Mahmud, p. 33
 170. Sulaiman Kumo, p. 24
 171. *Federal Government Views on the Report of the Area Courts Reform Committee (FGVRACRC).* Lagos: Federal Ministry of Information, 1977 p. 3
 172. RACRC P. 40
 173. *ibid.* p. 39
 174. Abdulmalik Bappa Mahmud, p. 34
 175. RACRC, p. 10
 176. *White Paper on The Federal Military Government Views on the Report of the Customary Courts Reform Committee (WPFMGVRCCRC).* Lagos: Federal Ministry of Information, 1978 par. 11.
 177. *ibid.* par. 5
 178. *ibid.* par. 33
 179. Joseph Schacht, 'Report on the Position of Muhammadan Law in Northern Nigeria'. Oxford: 19 September, 1950 par. 11.
 180. Lord Lugard, p. 92

181. *NCCI-ASCR*, p. 108
182. *ibid.*
183. *ibid.*; and J. R. D. Anderson, p. 220
184. The Emirs emphasized their demand in a letter of 22 August 1950 to Brooke Commissions of Inquiry on Native Courts. It was signed by the Sultan of Sokoto (*NCCI-ASCR*, *op.cit* p. 108).
185. Joseph Schacht, par. 50
186. *ibid.* par. 59
187. J.N.D. Anderson, p. 220.
188. *NCCI-ASCR*, p. 110.
189. Abdulmalik Bappa Mahmud, p. 37
190. *ibid.* p. 39
191. Lord Lugard, p. 92
192. *SGNRNRLJSNR*, pars. 12, 14, 17, 18, 19, & 20
193. N.L.R. 203
194. Abdulmalik Bappa Mahmud, p. 42
195. Muhammad b. Ismāʿīl al-Kahlānī, p. 210
196. N.R.N.L.R. 81
197. N.N.C.R. 97
198. Abdulmalik Bappa Mahmud, p. 20
199. *Proceedings of the Constituent Assembly: Official Report Vol. I (PCAOR) Lagos: Federal Ministry of Information 1978 p. 8*
200. W.R.N. (1963) Cap. 26 s. 52.
201. D.I.C. Ewelukwa, 'Administration of Justice', in *Introduction to Nigerian Law* ed. by C.O. Okonkwo London: Sweet & Maxwell, 1980 p. 134.
202. W.N.L.N. 19.
203. D.I.O. Ewelukwa, p. 134
204. Abdulmalik Bappa Mahmud, p. 42 ff.
205. A.O. Obilade, p. 176
206. Abdulmalik Bappa Mahmud, p. 42
207. *ibid.* p. 43
208. *PCAOR*, p. 34
209. Abdulmalik Bappa Mahmud p. 45
210. According to Y.Y. Ogirimah, a walk-out in any assembly of such a magnitude often resulted to a loss to the protesting group (Y.Y. Ogirimah, 'Shari'ah Controversy in Nigeria'. Unpublished M.A. Research Essay. University of Ilorin, Ilorin, 1982 p. 79.
211. FCA/K/69/85 of 2 June 1983 – A Case from Kano State High Court.
212. CA/3/16s/84 of 30 January 1985 – A Case from Borno State *Shari'ah* Court of Appeal.
213. CA/K/80s/85 of 11 December 1985 – A Case from Niger State *Shari'ah* Court of Appeal.

CHAPTER THREE

Shari'ah Legal Practice in the Lower Courts

Native Courts Law No. 6 of 1956 which repealed Chapter 142 of the 1948 Laws of Nigeria, Northern Region Law No. 4 of 1952, and section 61 of Northern Region Law No. 8 of 1955, became operative in May 1956; though some of its sections could not be applied until September 1956. In 1957, some other new sections of the Law were enacted and a few sections of the 1956 version were modified. By May 1957, all the various sections of the Law had become operative. It was later repealed in 1968 by the Area Courts Edicts but hitherto, it had been amended *mutatis mutandis*. Reference to Native Courts Law in this work therefore covers the various amendments and reforms as well as subsidiary legislations on the court till 1967¹. Quotation of any part of the law as contained in this work is from the 1963 edition of the Laws of Northern Nigeria which was published in 1965.

Area Courts Edicts which became operative in April 1968 were enacted in either 1967 or 1968 by the different States that hitherto constituted the Northern Region of Nigeria. The contents of the Edicts are identical². However, some sections have been amended by the different States at different times. The amendments were also identical in many respects; yet, some others were unique to certain States and these have been appropriately stated in this work. The common amendments to all the States were made sequel to (i) the implementation of the Report of Area Courts Reforms Committee, 1976; (ii) attempts of the States to bring certain provisions of the Edict into conformity with certain sections of 1979 Constitution of the Federal Republic of Nigeria; and (iii) Judicial precedent of some superior courts on certain sections which *ipso facto* amended such sections. The unique amendments to some States were made consequent upon certain motions of State legislatures which they passed into law during the civilian regime or orders of the Governor on notable sections.

This chapter examines the organisational structure, jurisdiction and function of the lower courts under six divisions: establishment and control of the courts, their constitution and staff, their jurisdiction, laws administered in them, their supervision and appeal system, and their practice and

procedure. Our approach is to state the relevant section(s) of Native Courts Law as affecting the topic under discussion, relate it to the appropriate section(s) of the Area Courts Edicts and compare the two provisions or one of them with the recommendation(s) of 1976 Area Courts Reform Committee on the section(s). On few occasions, we considered subsequent amendment(s) to the Edict in that regard along with the previous enactment(s), legislation or recommendation(s). This method facilitates easy identification of progressive reforms on *Shari'ah* law as applied in the lower courts. We also compare the status and welfare of Area Courts and their staff with the situation in the magistrates' courts and their personnel. We hope that such a comparison will help judicial administrators in planning the future of these courts for the purpose of eliminating the existing crisis and tension in them.

3.1 Establishment and Control of Native/Area Courts

The power to establish Native Courts was vested in the provincial Commissioners. They established the courts anywhere in their respective Provinces by warrant under their hands³. They also had the power to grade or regrade the courts to A, B, C, or D but such grading or regrading was subject to the approval of the Minister in charge of judicial affairs⁴. The powers of the Provincial Commissioners in this regard were transferred to the Chief Judge of the respective States in 1968. By warrant under his hand, the Chief Judge can establish Area Courts⁵, suspend, cancel or vary any warrant with which an Area Court was established⁶. It is of note that, as Native Courts changed name to Area Courts, grades A, B, C, and D also changed to Upper Area and grades I, II, and III respectively.

The Provincial Commissioner was the director and controller of where and when Native Courts' sessions should hold⁷, but he had no power to appoint judges for the courts. Appointment and discipline of Native Court judges were vested in the Native Authority of the area in which the court was established⁸. The Native Authority was conferred with such power because it was conversant with the native people and it could determine who was competent to hold the post of a judge with the application of the *Shari'ah* and, or the people's native law and custom. With the enactment of Area Courts Edicts, the Public Service Commission(s) took over the functions of the Native Authorities in this regard⁹. Judges of Area Courts became public servants under the respective State governments. Composition of the Public Service Commission(s) (mainly indigenes of the State) made it competent to take over the appointment and discipline of Area Court judges from the Native Authorities.

The establishment of Native/Area courts, appointment, discipline and dismissal of their judges, and power to control and direct their sessions which were vested in different authorities were fraught with many problems among which was clash of authority when an erring judge was to be disciplined. Such a clash was between the Provincial Commissioner and the Native Authority, prior to 1968, and between the Public Service Commission and the Chief Judge, thereafter. A sample case was reported by Sir Nigel Reed, the former Chief Justice of Northern Nigeria¹⁰. His experience under the application of that dual authority over the Native/Area Court judges guided him to suggest the establishment of a Judicial Service Commission, not only for Native/Area courts personnel, but for all judicial and quasi-judicial officers. A similar recommendation was made by the Area Courts Reform Committee, 1976 which was of the view that if its recommendation could be implemented, the appointment and control of area court judges would be vested in a competent body whose composition promised effective solution to clash of authorities. The Federal Government eventually accepted the committee's recommendation in this regard¹¹. Consequently, each State in the defunct Northern Nigeria established a Judicial Service Commission to appoint, direct and discipline Area court judges, (among many other functions of the commission.)¹²

In our research on the viability of establishing Judicial Service Commissions, majority of people interviewed¹³ gave credit to the Commissions' establishment. They claimed that the Commission had harmonised the authority to control, direct and discipline Area Court judges and they thereby supported its retention. They, however, complained of neglect in terms of distribution of amenities to Area Courts division of the judiciary by the Chief Judge who is the Chairman of the Commission. They observed that there are basically three arms of the judiciary: the High/Magistrate courts, the Area courts and the *Shari'ah* Court of Appeal. While the Grand Kadi should normally protect the interest of the *Shari'ah* Court of Appeal in the commission's meetings, the Chief Judge would equally protect the interest of the High/Magistrate courts (which are akin to his area of specialisation) more than the interest of Area Courts – though both are under his control. In the light of the various data we received on the Judicial Service Commission, it appears to us desirable to review its structure.

Composition of the Judicial Service Commission as recommended by the Area Courts Reform Committee, 1976 is as follows:

1. Chief Judge (Chairman);
2. Grand Kadi (Member);
3. Attorney-General (Member);
4. Chairman of the Public Service Commission (Member);
5. Two other members with relevant experience to be appointed by the Military Governor; and
6. Chief Registrar (Secretary)¹⁴.

The Federal Government accepted this recommendation but limited items 5 and 6 to 'only one other member'. The Government further suggested that such other member may be the most senior Emir or Chief in the State in order to 'give the traditional rulers a little say in the administration of area courts'¹⁵. Government White Paper on the Report also emphasized that the Chief Registrar should serve only as Secretary to the Commission and not as member.

State governments implemented the views of the Federal Government on the composition of their respective Judicial Service Commissions with an indirect exclusion of the Emir or Chief and a direct exclusion of the Chairman of the States' Civil Service Commissions as members. All the States enacted laws on the Chief Judge of the State as Chairman of the Judicial Service Commission, the Grand Kadi and the Attorney-General as members, and the Chief Registrar of the High Court as Secretary. They commonly provide for the appointment of a 'legal practitioner' from the bar as member instead of the Chairman of the Public Service Commission. The other member of the Judicial Service Commission was enacted to be 'any person not being a legal practitioner, who in the opinion of the Governor is of unquestionable integrity'¹⁶.

In view of the fact that both the Chief Judge and the Grand Kadi of a State are at par in status¹⁷ and whereas both the Chief Registrars of the High Court and the *Shar'ah* Court of Appeal are also equal in rank¹⁸, and in view of the fact that area courts apply three types of Law (English law, Native law and custom, and *Shar'ah* law), and are the busiest courts in the respective localities, we observe that:

- i. Both the Chief Judge and the Grand Kadi of a State should be members of the Judicial Service Commission while a neutral full-time chairman with necessary qualifications¹⁹ should be appointed for it. In (the) alternative, chairmanship of the Commission may be made rotational on either temporary or permanent basis. The temporary basis shall be for an appointed term like two or three years while the permanent basis shall be by

- seniority in office – hence, the senior of the two shall be the chairman till he retires when the other takes over;
- ii. A neutral secretary should also be appointed for the Commission on full-time basis like the proposed chairman²⁰;
 - iii. The Chief Inspector of Area Courts should be accorded the status of Chief Registrar of a superior court, to enable him (to) deal directly with the Secretary of the Commission on matters relating to Area Courts, as the two other Chief Registrars deal with him on matters pertaining to their respective courts;
 - iv. The three Chief Registrars (of the Area Court, the High Court and the *Shar'ah* Court of Appeal) should be in attendance as ex-officio members of the Commission;
 - v. The State Commissioner of Police should be considered member of the Commission²¹;
 - vi. The Attorney-General should retain his membership of the Commission;
 - vii. The Chairman of the State's Public Service Commission should be reconsidered as member of the Commission²²;
 - viii. The current Chairman of the State's Bar Association at any given time should be the automatic representative of the Bar in the commission;
 - ix. All judicial matters in the State should first be referred to the Chairman through the Secretary of the commission who should in turn cause such matters to be directed to appropriate quarters. We feel that if these observations are considered, peace will return to the entire Judiciary, since appointment, control and discipline of courts' personnel will be affected under no suspicion or witch-hunting.

3.2 Constitution and Staff of Native/Area Courts

3.2.1. Constitution

Native Courts Law provided for both a single judge and more than one judge to constitute a Native Court for the purpose of justice dispensation²³. Where a single judge constituted a court, it was an *alkali* court, applying Islamic law *per se*. The law also gave provision for the appointment of an assistant or some assistants to the *alkali* but such assistant(s) had no judicial powers²⁴. By this, the law has recognised the constitution of an Islamic court by a single *qadi* who was often assisted by a *Mufti*. Identical provisions to the Native Courts Law in this respect were made in the Area Courts Edict. Section 4 (1) (a) of the Edict recognises the constitution of an Area Court by a

single judge sitting alone while sub-section (1) (b) provides for the constitution of the court by a judge with one or more members. It also states categorically that questions of Islamic law shall be treated by a judge learned in Islamic law sitting alone²⁵. The provided assistant(s) under the Native Courts Law which we have interpreted to mean *Mufti* are designated assessors under the Area Courts Edict²⁶.

The Area Courts, in predominant Muslim populace, are often constituted by judges learned in Islamic Law although they have ceased to be legally called *alkalai*. In Kano State, every Area Court was constituted by a single judge as provided by Kano State Area Courts (Jurisdiction) Notice of 1 April 1979²⁷. In the same year, Borno State had 110 judges learned in Islamic law out of the 114 judges in her Area Courts²⁸. In Niger State, the predominant Islamic areas like Agaie, Gbako, Lapai and Lavun had their Area Courts manned by judges learned in *Shari'ah* law while in other areas like Chanchaga, Rafi and Suleja both *Shari'ah* and non-*Shari'ah* judges administered justice in their Area Courts²⁹. The situation in Kwara State is unique because out of the 156 Area Court judges serving the state in 1986, only thirty-one were declared learned in the *Shari'ah* law. In all the states, religious inclination of the populace often determined the constitution of area courts. The situation in Kwara State as related here does not reflect the percentage of Muslims in the State³⁰. The implication of this anomaly on the State and other parts of Northern Nigeria are discussed in Chapter Five.

3.2.2 Staff

The recognised officers of Native/Area Courts include court registrar, clerk or scribe³¹. Other officers include an interpreter³² and assistant(s) or assessor(s) to the judge as earlier discussed. There is also provision for the appointment of bailiffs and messengers whose functions are scheduled in Native Courts Law, section 16(1) and (2) (a)-(d) and Area Courts Edict, section 12(1) and (2) (a)-(d). We have discussed in Chapter Two³³ how Native Court judges lost their reputation in the public due to some political reasons. We hereby add that the calibre and qualification of other court personnel contributed further to whittling down the status of not only the Native/Area courts judges but also the laws administered in them. Result of our interview on the cause of the dent in image of Native/Area Courts personnel revealed that the court officers were corrupt in many respects and majority of them were incompetent to perform the duties allotted to their

respective offices. These anomalies were also discovered by the Area Courts Reform Committee, 1976, and it recommended certain qualifications for each category of officer of the court.

The Reform Committee recommended the qualification of court registrar(s) to be either a Diploma in law or by promotion from the post of clerical officer after passing prescribed examinations³⁴. 'Either West African School Certificate/ General Certificate of Education, or its equivalent' among which is Teachers' Grade II Certificate was recommended for court clerks. As for the bailiffs and messengers, the Committee recommended 'either Primary Seven Leaving Certificate with the ability to speak the local language', or the appointees could be 'ex-servicemen or ex-policemen with good discharge certificate'³⁵. The Committee also considered the qualification of Area court judges and recommended as follows:

- i. Judges learned in Islamic law may possess: (a) degree in Islamic Law, (b) Certificate of Kano School of Arabic Studies, (c) Diploma in *Shari'ah* and Civil Law of the Institute of Administration, Zaria/Diploma in Islamic and Comparative Law of the School of African and Oriental Studies, University of London; or (d) Certificate in Law from one School of Arabic Studies/Higher Muslim School Certificate.
- ii. Judges with no knowledge of the *Shari'ah* may possess: (a) degree in Law from a recognised university, (b) diploma in Law from the Institute of Administration; (c) the appointee may be a legal practitioner³⁶.

The Federal Military Government, in the White Paper on the Report, accepted all the Committee's recommendations in this regard with emphasis on practical experience – in addition to the recommended paper qualification(s) – for any appointed court officer³⁷.

Salaries of Native courts staff were paid by the Native Authority in whose locality the courts were situated³⁸ while the revenue generated by the courts were correspondingly paid into the coffers of the same Native Authority³⁹. When the control of the courts came to the State governments under the Area Courts Edicts, remuneration of area Courts Staff became the responsibility of the respective state government and the revenue generated by the courts were accordingly paid to the treasury of the State(s)⁴⁰.

We have noted in Chapter Two⁴¹ that prior to 1956, differences abound in the remuneration of Native courts *alkalai*. The same system continued after 1956 because the various Native Authorities paid salaries to their respective courts' personnel

according to their respective resources. Attempts were, however, made later under the Area Courts Edicts to pay uniform salary on identical judicial posts. Nevertheless, the various state governments paid different salaries for the same posts or grades, because the recipients had varied paper qualifications and orientation. However, the Area courts Reform Committee, 1976 has recommended the harmonisation of remuneration of area courts staff. It recommended minimum qualification(s) for each category of staff and suggested salaries for each post as earlier discussed. Towards the implementation of the committee's recommendations on this matter, *Schemes of Services for recognised cadres in the Civil Service* published in 1979 contained salaries, qualifications and duties of all judicial personnel including those of area courts.

A Bailiff could start on salary scale GL 04. His first promotion would be to the post of Senior Bailiff on GL 05 while his last promotion would be to Chief Bailiff on GL 06. An Area Court Registrar would run through eight posts and grades starting from Assistant Registrar on GL 06 to Registrar on GL 07, Higher Registrar on GL 08, Senior Registrar on GL 09, Principal Registrar on GL 10, Assistant Chief Registrar on GL11 and Chief Registrar on GL 13. Judges of the Area Courts who joined the judicial service with the minimum required qualification(s) could be promoted nine times before getting to the bar on GL 15 as Upper Area Court judge grade I. Starting as an Area Court member, he could be promoted to Area Court judge grade II, Area Court judge grade I, Higher Area Court judge, Senior Area Court judge, Principal Area court judge grade II, Principal Area Court judge grade I, Upper Area Court judge grade I on GL 06, 07, 08, 09, 10, 11, 12, 13, 14, and 15 respectively.

Staff of Area Courts Inspectorate Division also have their salaries fixed in the said *Schemes of Services* as follows: Inspector of Area Court Grade II – GL 08, Grade I – GL 09, Senior Inspector – GL 10, Principal Inspector – GL 12, Assistant Chief Inspector – GL 13 and Chief Inspector – GL 14. Salary of the Chief Inspector was raised from GL 14 to GL 15 by Circular No. GRA/I/VIII/606 of 18 January 1980 issued by the Secretary of the Civil Service Commission of the Federation. However, when some civil servants were reverted in 1984 to the salaries they were earning prior to the Second Republic, the Chief Inspector of Area Courts were reverted to GL 14 on paper but the incumbents of the post were left on GL 15 as personal to them⁴².

By way of comparison, an Associate Magistrate is on a salary of GL 08 step 4 for a start. He becomes a Magistrate Grade II on GL 09, Grade I on GL 10, Senior Magistrate Grade II on GL

12, Grade I on GL 13, Chief Magistrate Grade II on GL 14, and Grade I on GL 15 through successive promotions. A Chief Magistrate can be appointed as Deputy Chief Registrar of the High Courts on GL 15 or a Chief Registrar on GL 16.

It is clear from the foregoing that a member of an Area Court who starts on GL 04 as salary, based on his paper qualification, can rise to the post of Upper Area Court Judge Grade I on GL 15, while an Associate Magistrate, who starts on GL 08 step 4, can rise to the post of Chief Registrar of the High Court on GL 16. The implications of these discrepancies in remuneration which arise from the possession of variant basic paper qualifications and experience are discussed in Chapter Five. Meanwhile, a consideration of the jurisdiction of Native/Area Courts is desirable before a balanced comparison of the Native and English systems of court administration can be justly made.

3.3 Jurisdiction of Native/Area Courts

Jurisdiction of a Native Court was often set in the warrant which established it. On a general note, every Native Court was conferred with territorial jurisdiction, jurisdiction *ex-personae*, and jurisdiction over causes and matters.

3.3.1 Territorial Jurisdiction

Prior to 1968, Native Courts' territorial jurisdiction was mixed with their jurisdiction over causes and matters but generally, each court had jurisdiction over the area 'in which the defendant is ordinarily resident or in which the defendant was at the time when the cause of action arose'.⁴³ The same provision was made for the Area Courts. Section 19(2) (a) and (b) of the Area Courts Edict is identical with section 22 (2) (a) and (b) of the Native Courts Law in wording and content. The Area Courts Reform Committee Report, 1976 recommended the continuation with the Chief Judge's power on the conferment of jurisdiction over Area courts as contained in section 3 of the Edict, particularly sub-sections (2) and (5). We support this recommendation only in part. We feel that the Grand Kadi should share that power with the Chief Judge or the power be completely transferred to the suggested new Chairman of the Judicial Service Committee, acting on the advice of both the Chief Judge and the Grand Kadi. Further recommendations in this regard are made in the concluding chapter to this work.

3.3.2 Jurisdiction *Ex-personae*

Jurisdiction *ex-personae* of Native Courts is contained in section 18 of Native Courts Law. According to its sub-section (i), a

Native Court could exercise jurisdiction over the following classes of persons:

- a. All persons:**
 - i. who permanently reside on land within the area of jurisdiction of a native authority with the permission expressed or implied, of the native authority, given in virtue of any power which the native authority in any capacity may have to give such permission; and**
 - ii. whose general mode of life is that of the general native community;**
- b. All persons not permanently resident within the area of jurisdiction of a native authority but who are within such an area and whose general mode of life while therein is that of the general native community;**
- c. All persons:**
 - i. who reside or are on land within the area of jurisdiction of a native authority as tenants or employees of any person holding such land in virtue of a right of occupancy granted in writing or otherwise by the Minister charged with responsibility for land or by some person, not being a native authority, to whom the Minister charged with responsibility for land may have delegated the power to grant such a right of occupancy; and**
 - ii. whose general mode of life is that of the general native community;**
- d. Persons or classes of persons whether of African or non-African descent whom or which the Governor-in-Council may direct to be subject to the jurisdiction of any particular class of native court or of any particular court or to be subject to such jurisdiction in certain causes or classes of causes only;**
- e. Persons whether of African or non-African descent who have at any time instituted proceedings in any native court;**
- f. All natives of Nigeria and all native foreigners in cases in which they consent to the exercise of the jurisdiction of the native court.**

This elaborate jurisdiction *ex-personae* of Native Courts was summarised in the Area Courts Edicts as follows:

Subject to the provision of this Edict and any other written law, any person may institute and prosecute any cause or matter in an area court.

Any person who institutes or prosecutes any cause or matter in an area court under the provisions of sub-section (i) shall in that cause or matter be subject to jurisdiction of that area court and of any other court exercising jurisdiction in that cause or matter⁴⁴.

Subject to the provisions of this Edict and any other written law, the following persons shall be subject to the jurisdiction of area courts –

- a. Any person whose parents were members of any tribe or tribes indigenous to some parts of Africa and the descendants of any such person;
- b. Any person one of whose parents was a member of such tribe, and
- c. Any other person in a cause or matter in which he consents to the exercise of the jurisdiction of the area court⁴⁵.

The Area Courts Reform Committee of 1976 considered this subject and recommended that ‘area courts should have jurisdiction over all Nigerians only’ and that section 15 of the Area Courts Edicts be amended to that effect⁴⁶. The Government rejected the committee’s recommendation in this regard, observing that ‘the Committee seems to overlook the interest of the nationals of other African countries, particularly Niger, Chad and Cameroon Republics who are residents in or visitors to the Northern States and who have always been enjoying the right of access to the area courts’⁴⁷.

By way of analysis, we note the recommendation of the Reform Committee that jurisdiction *ex-personae* of the Area Courts should be limited to only Nigerians, as we appreciate the comments of the Government on the recommendation. We, however, observe that such jurisdiction should not be limited to nationals of African countries. We suggested the inclusion of some parts of section 18(i) of Native Courts to non-Africans in the Area Courts Edict since Islam does not discriminate on the basis of ethnic group or race⁴⁸ and any Muslim can seek redress in any Islamic court which may be dispensing justice with the *Shari’ah* in his area of domicile. Such extension of Area Courts jurisdiction is desirable to enable non-African Muslims in Nigeria to be subject to the jurisdiction of Area Courts on Islamic causes and matters as their non-

Muslim counterparts can, at present, be tried in the High Court (English) division of the judiciary⁴⁹.

3.3.3 Jurisdiction over Causes and Matters

A Native Court had powers to the extent set for it by the warrant of the Provincial Commissioner who established it. Such jurisdiction and power were subjected to the provisions of Native Courts Law in all civil causes and the Criminal Procedure Code Law/Penal Code Law in all criminal cases provided all parties to the suit belong to a class of persons subject to the jurisdiction of native courts. Area Courts stepped into the shoes of the abolished Native Courts *in toto*. Sections 17 and 18 of the Edict replaced sections 20 to 22 of Native Courts Law on civil and criminal jurisdiction of the court(s).

Native Courts were graded 'A', 'A' limited, 'B', 'C', and 'D' for the purpose of conferment of jurisdiction over causes and matters and the jurisdiction per grade was specified in the Schedules attached to the Law. Area Courts were also graded in that regard and in yet another set of schedules. Two tables are presented below on the two types of jurisdiction (civil and criminal) according to the grades of the courts as contained in the Schedules. The Area Courts Reform Committee, 1976 recommended a new set of jurisdiction for the Area Courts in its Report. The two tables also considered the Committee's recommendation:

Table X: Civil Jurisdiction of Native/Area Courts on Subject Matter According to the Schedules and the Approved Recommendations of Area Courts Reform Committee, 1976

Type of Civil Causes	Period	Native Court Grade 'A' & 'A' Limited/Upper Area Court	Native Court Grade 'B' / Area Court Grade I	Native Court Grade 'C' / Area Court Grade II	Native Court Grade 'D' / Area Court Grade III
i. Matrimonial causes and matters between persons married under native law and custom or arising from or connected with a union contracted by native law and custom other than those arising from or connected with a Christian marriage as defined in section 1 of the Criminal Code (Cap. 42 of 1958 Laws).	1.NCL, 1963 2.ACE, 1967 3.FGVRA-CRC, 1977	Unlimited Unlimited Unlimited	Unlimited Unlimited Unlimited	Unlimited Unlimited Unlimited	Unlimited Unlimited
ii. Suits relating to the custody of children under native law and custom.	1. NCL, 1963 2. ACE, 1967 3. FGVRA-CRC, 1977	Unlimited Unlimited Unlimited	Unlimited Unlimited Unlimited	Unlimited Unlimited Unlimited	Unlimited Unlimited
iii. Civil actions in which debt, demand or damages do not exceed the amounts specified in the respective columns hereof.	1. NCL, 1963 2. ACE, 1967 3. FGVRA-CRC, 1977	Unlimited Unlimited Unlimited	£200 ₦1,000 ₦20,000	£100 ₦400 ₦10,000	£50 ₦100
iv. Causes and matters relating to the succession to property and the administration of estates under native law and custom where the value of the property does not exceed the amounts specified in the respective columns hereof	1. NCL, 1963 2. ACE, 1967 3. FGVRA-CRC, 1977	Unlimited Unlimited Unlimited	£500 Unlimited Unlimited	£100 ₦500 ₦10,000	£50 ₦200
v. Causes and matters concerning the ownership, possession or occupation of land in which the value of the subject matter does not exceed the amounts specified in the respective columns hereof.	1. NCL, 1963 2. ACE, 1967 3. FGVRA-CRC, 1977	Unlimited Unlimited Unlimited	£500 ₦2,000 ₦20,000	£100 ₦500 ₦10,000	£50 ₦200

Table XI: Criminal Jurisdiction of Native/Area Courts on Subject Matter According to the Schedules and the Approved Recommendations of Area Courts Reform Committee, 1976

Period	Native Court Grade 'A' & 'A' Limited/Upper Area Court	Native Court Grade 'B' / Area Court Grade I	Native Court Grade 'C' / Area Court Grade II	Native Court Grade 'D' / Area Court Grade III
NCL, 1963	Unlimited but no sentence of death to be carried out until it has been confirmed by the Minister according to Sect. 394 of the Criminal Procedure Code	Imprisonment for three years or a fine of one hundred and fifty pounds	Imprisonment for eighteen months or a fine of thirty pounds	Imprisonment for nine months or a fine of one hundred naira.
ACE, 1967	Limited only by absence of jurisdiction in homicide cases; otherwise unlimited.	Imprisonment for five years or a fine of one thousand naira	Imprisonment for three years or a fine of six hundred naira	Imprisonment for nine months or a fine of one hundred naira
FGVRACRC, 1977	Ten years imprisonment and a fine of up to two thousand naira	Imprisonment for five years and a fine of one thousand naira	Imprisonment for three years and a fine of six hundred naira	—

N.B: Gongola State amended its Area Courts Edict in Gazette No. 22, Vol.10 of 30 May, 1985 with Edict No.7 entitled 'The Area Courts (Amendment) Edict, 1979' in conformity with the Federal Government's views on the jurisdiction of Area Courts over causes and matters as contained in Tables X and XI above.

3.4 Laws Administered in Native/Area Courts

As long as Criminal Code Law is not of Islamic orientation and as long as the prescribed penalties in the Penal Code Law are not Islamic (though their offences are Islamic), our digest of 'laws administered' in the Native/Area Courts is limited to the civil rather than the criminal law. On the note, the prescribed civil laws for administration in Native/Area Courts are:

- a. The native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties,
- b. The provisions of any written law which the court may be authorised to enforce by any order made under section 24 (of the Edict or section 27 of Native Courts Law),
- c. The provisions of all rules and orders made under the Native Authority Law or under any legislation repealed or superseded by that law, and the provisions of all rules, orders, and other written law, and in force in the area of the jurisdiction of the court⁵⁰.

'The native law and custom prevailing in the area of the jurisdiction of the court' is mostly Islamic law (in Northern States of Nigeria) as identified by the Area Courts Reform Committee, 1976 in its Report which stated that 'the great majority of civil cases in Northern Nigeria are governed by Islamic laws'⁵¹. This research work has guided us to support the Committee's observation and to interpret section (c) in the above quotation to mean nothing but the *Shari'ah* Law since 'the provisions of all rules and orders made under any legislation repealed or superseded by that Law, and the provisions of all rules, orders, and other written law, and in force in the area of the jurisdiction of the court' are but the *Shari'ah* law applied prior to the advent of the British rule. Similarly, 'the provisions of all rules and orders made under the Native Authority Law' are *Shari'ah* Law in most cases, since such laws were made by either the Emir-in-Council or by the Native Authority Council which were mostly composed of Muslims and the paramount Emirs' nominees.

In some cases, the 'native law and custom' may turn out to be other than Islamic Law. Considering the reports of Bello Study Group, 1966, and Area Courts Reform Committee, 1976, such instances are so few that we find it insignificant for discussion in this work. Ideally, the law-makers should have therefore recognised Islamic law and given it prominence in the sections that contain 'Laws to be administered' in the courts. However, the colonial authorities and their successors who framed the Laws 'were mainly concerned... with differentiating between new laws which they imposed on the country and the other legacy or quasi-legal systems which governed the lives of the 'natives', and they therefore felt no pressing need to make what must have appeared to them as casuistical distinctions between the laws and customs of the various native communities'⁵². It is therefore desirable, when revising the Area Courts Edict, to make specific mention of *Shari'ah* law among the 'Laws to be administered' in the Area Courts. This recommendation is based on the fact that not less than 90 per cent of annual cases tried in the Northern States of Nigeria are handled by the Area Courts which applied the *Shari'ah* Law in most civil cases – as revealed by Bello Study Group, 1966 and Area Courts Reform Committee, 1976.

3.5 Supervision and Appeal System

3.5.1 Inspection

There was the need to supervise Native/Area Courts regularly in order to check the alleged corruption of their judges and to

protect litigants against the oppression and persecution of some possible tyrant judges. It is of note that legal practitioners were not allowed to hold brief for litigants in these courts. Representation could only be made through authorised relatives holding due proof of authority⁵³. There was therefore the tendency for justice to be miscarried and adequate provisions were therefore made under the law to forstall such anomaly. The laws provided for the appointment of inspectors of court⁵⁴ whose functions and powers include:

- a. Access to Native/Area Courts and their records at all times.
- b. Power to stall proceedings in such courts before final judgement.
- c. Power to transfer a case or matter from a court to another, or to a Magistrates' court, or to a District court.
- d. Power to report a case or matter before any Native/Area Court to the High Court.
- e. Power to report a case to a court in which an appeal would normally lie.

People of impeccable character who were lecturers of Islamic law⁵⁵ were the early set of court inspectors. Their charisma and dignity as teachers of the judges (*alkalal*) enhanced their success in the inspection of the courts. Later, the inspectorate division of the judiciary became short of competent personnel with adequate knowledge of Islamic law. The Area Courts Reform Committee of 1976 therefore recommended among other things that:

Sufficient number of Inspectors including Inspectors learned in Islamic law should be appointed in each State so as to make their supervisory duties more effective⁵⁶.

The Committee however suggested that the inspectorate division under the judiciary should be scrapped after five years from the date of its Report i.e. around 1981/82⁵⁷. No State has yet scrapped them. Our interview in early 1986 revealed that inspectorate division of the judiciary should not be scrapped. We found the inspectors very busy that to get them interviewed was difficult. Whereas, majority of the Area Court judges are stationed in the rural areas, far from the State headquarters, coupled with the size of area courts in terms of number, we opine that rather than scrapping the Area Courts Inspectorate Division, it should be enhanced. For example, among the major causes of the fall in the standard of education in Nigeria is the skeletal service by inspectors of education or the reduction of Inspectorate Divisions in the Ministries of Education to mere

rubber stamps on approval of secondary schools to write West African School Certificate Examinations after inspection. When such inspectorate divisions (on education) were functioning properly, there was a psychological fear of a sudden approach of inspectors in the teachers and that, of course, instilled a sense of commitment and dedication to duty in such teachers. We therefore deem the retention of Area Courts' inspection as proper. The court inspectors should continue to guide the judges, assist the litigants, check the excessive corrupt tendencies of the judges, and assist such judges with regard to their needs in their localities, since their courts are mostly located far away from the headquarters of the judiciary.

3.5.2 Transfer of Cases

A court inspector has the power to transfer a case from a court of lower grade to a court of higher grade if the former lacks jurisdiction in the case. The inspector can act in good faith to transfer a case to a court of equal or lower grade 'for the purposes of convenience'. Although the transfer of a case could be caused 'upon the application of either party' to a suit or by the motion of either of the two courts, it was the inspectors who often transferred cases because (i) the litigants in the rural areas were not conversant with their rights on the transfer of cases and (ii) the tendency was there for a judge to retain a particular case in his court, probably for the purpose of perpetuating corruption. Thus, with the knowledge of the judge that an inspector is empowered under the law to go through the record of his court at any time and that he (Inspector) can cause a cause or matter be inquired into, tried and determined by another court⁵⁸, the judge would be serious with his duties and would not allow justice to be miscarried in his court.

3.5.3 Review of Cases

Prior to 1968, an inspector of Native Courts could review cases if he was so empowered by the Minister of Justice⁵⁹. An inspector on whom the power of review has been conferred may of his own motion or in his absolute discretion, on the application of any person concerned, review any case in any Native court to which he has access⁶⁰, and may exercise therein any of the powers vested in the courts by sub-sections (3) and (4) of section 52 of Native Courts Law. Such powers have been scrapped since 1968 because the content of section 53 of Native Courts Law was omitted in the Area Courts Edict. However, section 52 of the law on the powers of the court to review cases was re-enacted as section 50 in the Edicts. Its

sub-section (1) empowers the inspector to report any case for review to any appropriate court since only the courts have the power to review cases:

An inspector, if in his opinion there has been a miscarriage of justice in any case before an area court to which he has access under the provisions of section 47, may of his motion or in his absolute discretion on the application of any person concerned, report that case to the court to which an appeal in such case would lie⁶¹.

We support this development because a power-drunk inspector may review cases for selfish interest either through receipt of bribes or for a show of his superior post to the judge as we earlier observed in Chapter Two⁶². However, the powers of the inspector 'to make an interim order suspending the operation of any sentence or order made by the lower courts in such case, or admitting to bail any person sentenced to imprisonment therein by the lower court' were not lost⁶³ and this we feel is proper.

When carrying out the review exercise, the court to which the case has been reported may:

- i. reverse, vary or confirm the decision given, or
- ii. set aside the conviction and sentence, judgement or other order of the lower court and order the case to be retried by any other competent court as prescribed in sub-section (3) (a) and (b) of both section 52 of Native Courts Law and section 50 of Area Courts Edict.

3.5.4 Appeals

Whenever an Inspector of Native Courts discovered any miscarriage of justice or he wanted to act in good faith to arrest a possible miscarriage of justice, or any party to a case indicated to him the wish to appeal, he could direct that the appeal should lie from grade 'B', 'C' or 'D' Native Court in a Province in the Provincial Court which was established for that purpose⁶⁴. The Provincial Court was basically an appeal court, yet, it had powers to try cases at the first instance⁶⁵ and it was accorded equal jurisdiction with grade 'A' Limited Native Court in that regard⁶⁶. Further power of the Inspector of Native Courts was to cause the case of an aggrieved litigant by the decision or order of a grade 'A' Limited or 'A' Native Court, or a Provincial Court to lie in either the *Shar'ah* Court of Appeal in cases involving questions regarding Moslem Personal Law, or in the High Court in all other cases⁶⁷.

Provincial Courts and Native Courts grades 'A' and 'A' Limited were replaced in 1968 with Upper Area Courts. The new courts

were appeal courts *per se* with powers to determine appeal suits from Area Courts Grades I, II and III⁶⁸. Aggrieved litigants by the decision or order of an Upper Area Court can appeal to either the *Shari'ah* Court of Appeal or to the High Court as was the case under section 62 of Native Court Law⁶⁹. The high court has an extra power by which it can, by its own motion, request for cases from Area and Upper Court because they are under its control and supervision⁷⁰. The Area Courts Reform Committee, 1976, observed an imbalance in the distribution of appeal cases to both the High Court and the *Shari'ah* Court of Appeal as contained in section 54 of the Edict. The Committee's Report stated that this is 'an unsatisfactory state of affairs as it whittles down the status of both Islamic Law and the *Shari'ah* Court of Appeal – a situation which is offensive to popular sentiment'⁷¹. It further recommended that

- a. Appeals from the decision of Upper Area Courts and Area Courts grades I and II in criminal cases and matters under the native law and custom should lie in the High Courts;
- b. Appeals from the decision of Upper Area Courts and Area Courts grades I and II in the cases or matters governed by Islamic Personal Law should lie in the *Shari'ah* Court of Appeal; and
- c. ... the *Shari'ah* Courts of Appeal should be vested with jurisdiction on other matters governed by Islamic Law, which are now subject to the jurisdiction of the High Court⁷².

The Federal Government considered these recommendations and opined that:

- i. Appellate jurisdiction of Upper Area Courts be scrapped. In that wise, the court would be conferred with only the jurisdiction to hear cases at first instance⁷³; and
- ii. Appeals from grade I Area Courts should go direct to the *Shari'ah* Courts of Appeal⁷⁴.

In that wise, appeals would lie from the Area Courts direct in either the High Court in criminal cases and civil cases other than those governed by Islamic law, and in the *Shari'ah* Court of Appeal in all civil cases governed by Islamic law. Some States have amended their Area Courts Edict to reflect the view of the Federal Government in this respect. Examples are Plateau and Kwara States. Edict No. 8 of 1984, titled, 'Area Court Law (Amendment) Edict, 1984' amended, among others, section 53 of Plateau State Area Court Edict as follows:

Any party aggrieved by a decision or order of any Area Court may appeal to:

- a. The *Sharī'ah* Court of Appeal in cases involving questions regarding Moslem Personal Law;**
- b. The Customary Court of Appeal in cases involving questions regarding Customary Law; and**
- c. The High Court in all other cases.**

This amendment has taken cognisance of the establishment of a Customary Court of Appeal in Plateau State. With regard to Kwara State, Gazette No. 3 Vol. 20 of 28 April, 1986 contains Edict No. 5 of 1986 which amended section 54 of its Edict as follows:

- 1. Any party aggrieved by a decision or order of an Upper Area Court or any Area Court, Grade I or II in an Islamic Personal Law may appeal therefrom to the *Sharī'ah* Court of Appeal.**
- 2. Any party aggrieved by a decision or order of an Area Court Grade I or II in a civil matter other than Islamic Personal Law may appeal therefrom to the Upper Area Court having jurisdiction in the Area in which such Area Court is situated.**
- 3. Any party aggrieved by a decision or order of an Upper Area Court in any civil matter other than Islamic Personal Law may appeal to the High Court.**

In Plateau State, appellate jurisdiction of the Upper Area Court has been scrapped with the availability of three superior courts of appeal. The Upper Area Court was retained as the highest grade of Area Courts with jurisdiction in cases at first instance. Sub-section (1) of section 17 of the State's Edict was amended to that effect. But in Kwara State, the appellate jurisdiction of the Upper Area Court was not totally scrapped. The court was only relieved of entertaining appeal cases in which Islamic (Personal) Law was involved. Such Islamic cases should lie directly in the *Sharī'ah* Court of Appeal. Effects of these enactments in the superior courts of record are discussed in the next chapter. Meanwhile, Practice and Procedure in the lower courts follow.

3.6 Practice and Procedure

The governor was empowered to make Rules of Court prior to 1968 and such rules included the Practice and Procedure of 'native courts in their original jurisdiction, on review and on appeal'⁷⁵. The power was transferred to the Chief Justice of a

State with the repeal of the laws in 1968⁷⁶. All the listed powers of the governor in section 75 of Native Courts Law were re-enacted in section 65 of the Area Courts Edict. Similarly, the Native Courts (Civil Procedure) Rules made by the governor were retained without any amendment by the Chief Justice and they were renamed Area Courts (Civil Procedure) Rule. Reference to civil procedure rules or any part thereof in this work can therefore be taken to mean either those of the Native Courts or the Area Courts since the numbering of the Orders contained therein remains unchanged.

According to section 29 of Native Courts Law, practice and procedure of Native Courts in civil cases and matters were regulated in accordance with native law and custom while the courts were guided in criminal cases and matters by the provisions of the Criminal Procedure Code. Under the Area Courts Edicts, sections 20 and 21 which contain laws to be administered in civil causes were specified for application while the Criminal Procedure Codes were to regulate criminal cases. When a Native or Area Court was hearing a case, representation by legal practitioners was not allowed, though ordinary representation by the litigants' next of kin through consanguinity, affinity or employment can be entertained by the court provided the representative was holding due proof of permission for such representation as earlier discussed⁷⁷.

The Area Courts Reform Committee, 1976, considered the Practice and Procedure of Area Courts and recommended that legal practitioners should not be granted permission to practice in such courts. The courts should however be bound by the Criminal Procedure Codes in all criminal trials⁷⁸. The Federal Government accepted these recommendations in the White Paper on the Committee's report. The Committee further recommended that the Civil Procedure Rule in respect of hearing Islamic cases in the lower courts be codified and a sample of it was appended to the Report. It was only Sokoto State that, in 1980, codified Islamic Civil Procedure Rule for application by the Area Courts in the State. The Rule is contained in Sokoto State Gazette No. 6 Volume 14 of 26 June 1980 and titled Sokoto State Legal Notice No. 3: 'The Area Courts (Civil procedure) (Amendment) Rules, 1980'. It is appended to this work as Appendix III.

The thesis of Sulaiman Kumo (1972) digests in detail the practice and procedure of Area Courts as contained in the relevant Civil Procedure Rules; and the thesis compared such provisions with the teachings of Islamic jurists in their numerous works. To avoid duplication, our discussion in this

work revolves round some administrative issues connected with the practice and procedure in the Area Courts. However, a brief digest of some relevant orders of the Civil Procedure Rules is hereby presented to illustrate the procedure of an Area Court in hearing cases.

3.6.1 Procedure

The defendant in a case would appear before the court 'in accordance with the native law and custom applicable to the case or matter under consideration'⁷⁹. The court clerk or registrar would read to him the claim or complaint of the plaintiff with the explanation of 'the meaning and substance thereof to the satisfaction of the court'. The defendant would then be called upon to reply to the claim or complaint in accordance with Islamic rules of procedure until the judgement would be delivered or the case adjourned⁸⁰. The Qur'anic injunction on making arbitration⁸¹ was provided under the Rules. Both parties to a suit could be referred to an arbitration panel in such manner and on such terms as the court might think fit, just and reasonable. However, the report or award of the arbitrator(s) could be confirmed, set aside, or reconsidered by the court⁸².

The court could call for proofs and evidences from the litigants during the trial of a case. If a litigant could not bring his witness to court by his own persuasion, the court could help him bring the witness through the issuance of a warrant. The litigant should however bear the cost of that witness' travelling and subsistence by depositing sufficient money with the court to cover such expenses⁸³. All evidences given, and the method by which such evidences should be given and recorded, must be in accordance with the native law and custom applicable to the cause or matter under consideration. Thus, the practice of giving evidence in court still conformed with *Shari'ah* provisions as long as the cause or matter was Islamic. The recommendation of the Reform Committee, 1976, that Area Courts should be guided by the Evidence Law which is English in orientation⁸⁴, and its acceptance by the Federal Government which added that Upper Area Courts should be bound by it was therefore meant for cases and matters other than those governed by Islamic Law⁸⁵. The judges of Area courts are empowered to inspect areas or venues of dispute in a case for the purpose of accurate assessment of the situation, claims or evidences before the court⁸⁶.

The court could strike out a case if either party to a suit failed to appear in court on the date of hearing unless the court could see a good reason to the contrary. It could also try a case on *ex-parte* after due proof of service of the process to

the absent litigant, provided the court is satisfied that the time between the date of service and the date of hearing was sufficient for him to have appeared had he wished to do so. The courts could as well continue to adjourn a case until a time it felt satisfied that justice could be dispensed⁸⁷. It is however dangerous and risky to decide cases and give judgement *ex-parte* because no court should take any action which was dependent upon a document being served upon any person unless service was admitted by such a person or service upon him has been proved⁸⁸.

In conclusion, the courts should be meticulous in taking evidence and screening witnesses. The credibility of witnesses must be tested. The litigant should be allowed to ask the witness(es) of the other party some questions as he might think necessary. Witnesses could be put to oath with due permission of the judge in order to clear ambiguities.

3.6.2 Practice

There are thousands of books written on Islamic law for the guidance of judges. Contents of such books cover jurisdiction of Area Courts over causes and matters. The most extensively consulted of the books by both the Islamic judges of the Area Courts and Kadis of the *Shari'ah* Court of Appeal are listed with relevant pages to each case or set of cases in the next chapter under the *Shari'ah* Court of Appeal. The books also treat extensively, many criminal offences listed in the Penal Code Law but the judges can no longer apply the provisions of the books since 1960 as discussed earlier. Notable among the Penal Code Law offences which are also offences according to the teachings of the *Shari'ah* are: Lotteries and Gaming Houses (s.205 & 206), offences affecting life (s.221–231), offences affecting an unborn or newly born child (s.232–239), hurt (s.240–261), theft (s.286–290), robbery and brigandage (s.296 – 307), cheating (s.320–325), offences relating to marriage and incest (s.383–390), defamation (s.391–395), and criminal intimidation, insult and annoyance, and drunkenness (s.396–404). The implication of abrogating Islamic penalties for these offences, and the relevant pages in which such penalties can be found in the Islamic Law books are discussed and listed in Chapter Five under the 'Problems and Prospects of the *Shari'ah* in Nigeria'.

The laws provided that proceedings should be in open courts⁸⁹ but the public may be excluded in cases involving juveniles or 'where the administration of justice would be rendered impracticable by the presence of the public'⁹⁰. It is lamentable that there are no sufficient court buildings for the judges of

Area courts. Apart from the court buildings inherited from the Native Authorities or Provincial Governments there is hardly any significant new addition. Area Courts conduct their business in either the town hall, a rented building or a court building donated by the people in a particular locality. In many cases, Area Courts are housed in uncompleted buildings. It is therefore disheartening to find that the courts which are the most popular judicial tribunals to the majority of people should be suffering in this regard. These important sets of courts should be accommodated in befitting buildings.

Section 37 of Native Courts Law and section 34 of Area Courts Edict provide that convicted accused persons should be imprisoned accordingly in prisons built by the government. Similar provision is made in Order XV of the Civil Procedure Rules. This is another area of neglect on the part of the government. Crime rate is increasing in the country as discussed in Chapter Five and many more people are convicted to imprisonment without commensurable improvement in the building of new prison houses or expansion of the existing ones. Our recommendations on these social problems are contained in Chapter Five. Meanwhile, the following chapter discusses the position of *Shari'ah* legal practice in superior courts of record.

Notes on Chapter Three

1. Such notifications include NR 12 of 1957, 22 of 1958, 10 of 1960, 21 of 1960; NN 46 of 1961, 25 of 1962, 33 of 1962, 11 of 1963, 27 of 1963, 40 of 1963; LN 120 of 1957; NRLN 120 of 1960, 144 of 1960; and>NNLN 7 of 1961, 186 of 1963, and 211 of 1963.
2. However, any quotation from the Edicts in this work is from the Kwara State version.
3. Native Courts Law (NCL), 1963; s.3(i).
4. *Ibid.* s.21(2) and (3).
5. *Area Courts Edict (ACE)*, 1967: s.3(i).
6. *Ibid.* s.3(3) and (5).
7. *NCL*: s.9(2) (a).
8. *Ibid.* s.6(i).
9. *ACE*: s.4(4).
10. *Report of the Area Courts Reform Committee, 1976, (RACRC)*. Lagos: Federal Ministry of Information, 1976 p.22.
11. *Federal Government Views on the Report of the Area Courts Reform Committee, 1976*. Lagos: Federal Ministry of Information, 1977 p.9 (FGVRACRC).

12. An example of the States' enactment in this respect is Kaduna State Law No. 7 of 1983 entitled 'The Kaduna State Judicial Service Commission Law, 1983' – as published in Gazette No. 22 Vol.17 of 27 October 1983.
13. They include Chief Inspectors of Area Courts and their deputies.
14. *RACRC*, p.36.
15. *FGVRACRC*, p.16.
16. Sokoto State Law No. 6 of 1979, entitled, 'A Law to provide for the Establishment of a State Judicial Service Commission' published in Gazette No. 16 Volume 13 of 27 December 1979.
17. Both the Chief Judge and the Grand Kadi of a State are at par in salary, fringe benefits and exercise of authority. However, the Chief Judge is always the chairman of the State Judicial Service Commission while the Grand Kadi is only a member.
18. Like the Chief Judge and the Grand Kadi, the Chief Registrar of the High Court and that of the *Shari'ah* Court of Appeal are at par in status and remuneration. That started in 1979 when the *Shari'ah* Court of Appeal assumed an autonomous branch of the judiciary.
19. Since office of such a chairman is political, the only qualification he should possess can be his ability to command respect from both the Chief Judge and the Grand Kadi, though, possession of knowledge in the applicable laws may be of advantage. However, if such a person cannot be found among the retired civil servants, the Governor of the State may take over the Chairmanship of the Commission due to his political charisma.
20. We have made this recommendation before we discovered, through further research, that the Commission had changed name to 'Committee' with a neutral secretary serving it – by virtue of Decree No. 1 of 1984.
21. He deserves to be a member of the Committee by virtue of police involvement in maintaining law and order in the state as well as prosecuting for the state in criminal cases.
22. The inclusion of the Chairman of the State's Civil Service Commission in the membership of the Committee will enrich the Committee's decision as it will benefit from the wide experience of that person from his own commission.

23. *NCL*: s.5(i).
24. *Ibid.* s.14.
25. *ACE*: s.4.
26. *Ibid.* s.5(3).
27. The questionnaire we administered to the State in 1986 confirmed that all her Area Courts were Islamic courts. Ninety-six judges were reported for ninety-six Area Courts.
28. It was only in Bema zone where the returns indicated eleven *Sharī'ah* judges out of the fifteen judges in the zone.
29. Out of seventy-four Area Court judges serving Niger State in 1986, thirty-seven were declared knowledgeable in Islamic law.
30. For details, read M.A. Ajetunmobi, '*Sharī'ah* Dispensation of Justice in Kwara State', unpublished M.A. Research Essay, Department of Religions, University of Ilorin, Nigeria, 1982 pp. 23-27.
31. *NCL*: s.12(1); and *ACE*: s.10(2).
32. *NCL*: s.12(2).
33. Towards the end of our discussion on the 'Position of the *Sharī'ah* Prior to 1967' i.e. 2.3.1.
34. *RACRC*, p.36.
35. *Ibid.* p.37.
36. *Ibid.* p.36
37. *FGVRACRC*, p.16.
38. *NCL*: s.10(1).
39. *Ibid.* s.10(2).
40. *ACE*: s.8,9 & 10.
41. When discussing 'Organisation of the Courts' under 2.2.3.
42. Information on this point was collected from both the Chief Inspector of Area Courts in Kwara State, Alhaji Yakubu Momoh and the Secretary of the State's Judicial Service Committee, Mr Lawal.
43. *NCL*: s.22(2) (a) and (b).
44. *ACE*: s.14(1) and (2).
45. *Ibid.* s.15(1).
46. *FGVRACRC*, p.13.
47. *Ibid.*
48. *Qur'ān*, 49:13
49. *NCL*: s.34.
50. *ACE*: s.20(1); and *NCL*: s.23.
51. *RACRC*, p.10.
52. *Ibid.* p.29.

53. NCL: s.31(1) and (2); and ACE: s.28(1) and (2).
54. NCL: s.46 ff; and ACE: s.45 ff.
55. FGVRACRC, p.16.
56. *Ibid.* p.10
57. *Ibid.*
58. NCL: s.50(2) (a) – (c); and ACE: s.48(2) (a) – (c).
59. NCL: s.53:(1) and (2).
60. *Ibid.* s.53(3).
61. ACE: s.50(i).
62. For example, last paragraph of section 2.3.1 entitled ‘Position of the *Shari’ah* Prior to 1967’; and the first paragraph of section 3.2.2 entitled ‘Staff’.
63. NCL: s.52(5); and ACE: s.50(5).
64. NCL: s.58.
65. *Ibid.* s. 56(3).
66. *Ibid.* s.59 (2) (a).
67. *Ibid.* s. 62.
68. ACE: s.53.
69. *Ibid.* s.54.
70. *Ibid.* s.43.
71. RACRC, p.21.
72. FGVRACRC, p.15
73. *Ibid.*
74. *Ibid.* p.8.
75. NCL: s.75.
76. ACE: s.65.
77. NCL: s.31; and ACE: s.28.
78. RACRC, p.34.
79. NCL: Order X
80. *Ibid.* Order XI, Part I.
81. Qur’an, 4:35
82. NCL: Order XII.
83. *Ibid.* Order XIII.
84. RACRC, p.34.
85. This is so because Evidence Law is applicable to only criminal cases, and Area Courts exercise no Islamic criminal jurisdiction.
86. ACE: s.42.
87. NCL: Order IX.
88. *Ibid.* Order III.
89. ACE: s.29 (1).
90. *Ibid.* s. 29(2).

CHAPTER FOUR

Shari'ah Legal Practice in the Superior Courts

Prior to 1967, when the first set of States were created in Nigeria, the *Shari'ah* Court of Appeal in Kaduna was the only superior court of record applying Islamic law in Northern Nigeria. Thereafter, the Court was decentralised, operating in the three zones as discussed in Chapter Two¹. With the creation of additional States in 1975, each State in the old Northern Nigeria established a separate *Shari'ah* Court of Appeal, except Benue and Plateau States which established one, and this, they share till now. Under the provisions of the 1979 Constitution, appeals from the States' *Shari'ah* Courts of Appeal may lie in the (Federal) Court of Appeal. The same constitution allows any aggrieved party, with the decision of the (Federal) Court of Appeal, to appeal to the Supreme Court which is the highest judicial tribunal in the country. Thus, *Shari'ah* cases can lie in the Supreme Court for final determination.

Our discussions in this chapter will therefore focus on the place of Islamic law in the three Superior Courts: the States *Shari'ah* Courts of Appeal, the (Federal) Court of Appeal, and the Supreme Court. Four out of the six sections in the chapter deal with the *Shari'ah* Courts of Appeal, while each of the other two deals with the Provisions Decree (No. 14 of 1967); and thus each state began to refer to the inherited Laws as the Laws of the State. Whereas the letters of the Laws remain uniform, our reference to any of its chapters shall be general to all the concerned states. Specific mention of a State's version of the Law may, however, arise when comparison is being made between specific provisions of some states or as may be deemed necessary.

General and common amendments to the Laws were made by the States at different times. For example, the amendments contained in Kaduna State Legal Notice No. 5 of 1982, entitled 'Constitution of the Federal Republic of Nigeria, 1979 – Modifications of Laws (Kaduna State) Order', published in Gazette No. 20, Volume 16 of 19 August 1982 were identical with the content of Kwara State Legal Notice No. 1 of 1983, entitled 'Constitution of the Federal Republic of Nigeria: Modification of Laws (Kwara State) Order', published in Gazette No. 16, Volume 18 of 16 February 1984. The amendments were

given retrospective effects i.e. 1979. Under the *Shari'ah* Court of Appeal Law, the word 'Judge' or 'Judges' was amended to 'Kadi' – in conformity with the provisions of the 1979 constitution. Other amendments to the *Shari'ah* Court of Appeal Law include the deletion of 'Registrar' in section 21 and its substitution by 'Chief Registrar', and the replacement of 'Native Court' with 'Area Court' in section 2. Other than these uniform amendments, some states have amended certain sections of the *Shari'ah* Court of Appeal Law to suit their needs, and references are made to such in the appropriate places. Lastly, any quotation from the *Shari'ah* Court of Appeal law in the chapter is from the 1963 edition of the Laws as published in 1965, unless otherwise stated or specified.

4.1 Establishment and Constitution

A *Shari'ah* Court of Appeal was established for the Northern Region of Nigeria for the purpose of hearing appeals 'from native courts in respect of cases involving questions regarding Moslem personal law⁵. It was a superior court of record empowered to punish for the offence 'commonly known as contempt of court⁶. The Court could have the composition of a Grand Kadi, a Deputy Grand Kadi and three other Kadis, totalling five⁷; though, if the government had decided to appoint less than five judges, the composition of the court would still be in order⁸ – provided the members so appointed were not less than three; because the Court would be regarded 'duly constituted for the hearing of appeals' if it was 'constituted of three Judges⁹'. The Grand Kadi was, by law, the President of the Court. In his absence, the Deputy Grand Kadi would preside.¹⁰ A similar tradition has been retained under the 1979 Constitution. The Grand Kadi is still recognised for the Court¹¹ but the number of Kadis of the Court is no more pegged to five¹². They can be as many as the State may require. Thus in 1983, some States had more than five Kadis in their respective *Shari'ah* Courts of Appeal. Such include Kaduna State with six and Kano State with seven, while Sokoto state which had five in 1981 appointed one more in 1986¹³. Still under the 1979 constitution, a *Shari'ah* Court of Appeal shall be duly constituted to hear appeals if it is constituted of at least two Kadis of the Court¹⁴. Thus, if a State should decide to appoint only two Kadis for her *Shari'ah* Court of Appeal, such appointment shall be constitutional.

Appointments to the offices of the Grand Kadi and Kadis of the *Shari'ah* Court of Appeal were made by the Governor of Northern Nigeria prior to 1967, by the Governors of the States thereafter¹⁵, and by the Federal Military Government since 1984¹⁶. Prior to 1979, any person appointed a Kadi must not be

less than thirty-five years of age at the time of his appointment and he must be a Muslim¹⁷. The 1979 Constitution is not specific on these qualifications, but by way of interpretation, it approves them under section 274(1)¹⁸. On the age of retirement, the pre-1979 Laws stipulated 62 years¹⁹ while the 1979 Constitution fixed 60 years for voluntary retirement and 65 years for compulsory retirement²⁰. A Kadi can, however, resign from office at any time²¹. A list of Grand Kadis and Kadis of Northern Nigeria *Shari'ah* Court of Appeal from 1960 to 1986 is attached to this work as Appendix III.

The flexibility of the relevant section of the 1979 Constitution on the composition of a *Shari'ah* Court of Appeal caused variation in the number of available Kadis in the different states as contained in the Appendix. We are convinced that the volume of litigation should determine the number of required Kadis in a Court. Kano State can justify the appointment of as many as seven Kadis (including the Grand Kadi) for her *Shari'ah* Court of Appeal when the number of cases determined by the court between 1980 and 1985 which totals 1,095 is considered. Comparatively, Gongola State *Shari'ah* Court of Appeal which had four Kadis (including the Grand Kadi) determined only 150 cases within the same period of six years (1980-1985).

4.1.2 Officers of the Court

A Kadi of *Shari'ah* Court of Appeal must have been an *alkali* or an adviser on 'Moslem law' for not less than ten years or holding a certificate of satisfactorily completing 'a recognised course of study in *Shari'ah* law at a university, college or school approved by the Governor-in-Council²². A similar provision has been entrenched in the 1979 constitution which stipulates that a person is qualified for appointment as a Kadi of the *Shari'ah* Court of Appeal, if:

- a. he has attended and has obtained a recognised qualification in Islamic (personal) law from an institution approved by the State Judicial Service Commission and has held the qualification for a period of not less than 10 years; and
- b. he either has considerable experience in the practice of Islamic (personal) law or he is a distinguished scholar of Islamic (personal) law.²³

When appointed, the Kadi shall not be liable to be sued in any court for any act done or ordered by him in the exercise of the jurisdiction conferred upon him by the Law²⁴. Thus, he has been protected against a possible court action by any aggrieved

litigant, as long as he is acting in good faith in the cause of discharging his duty.

A *Shari'ah* Court of Appeal is entitled to have a number of Court personnel for the smooth running of its daily business. Apart from the specified posts of Registrar, Bailiff, Messengers and Interpreters, the Court may have other unspecified number of officers under special order of the Grand Kadi. For example, the Court is entitled to the service of law enforcement agents to carry out its orders.²⁵ There must also be in Court some officers in charge of receiving fees and costs, i.e. those who should deal with all monetary issues. Qualifications and duties of Court Personnel discussed in Chapter Three²⁶ are also relevant to this section. However, the duties of the Registrar of the *Shari'ah* Court of Appeal are worth discussing here.

The Registrar is to keep the record of all forms issued by the court. Such forms must be in duplicate to facilitate the retention of a copy by the court.²⁷ The most frequently used forms in the *Shari'ah* Court of Appeal include 'General Titled' for appeal, 'Notice of Sessions', 'Order for Security of Costs', 'Notice of Appeal and Hearing', 'Order to Produce Appellant', 'Order for Stay of Execution', and 'Certificate of Judgements to be Enforced by Court Below'²⁸. The Registrar should also see to the proper keeping of record books containing judgements of the Court. He should cause a copy of any appeal proceeding be supplied to any party to the appeal; and with the consent of the Court, to any other person 'upon the application and payment of the prescribed fee.'²⁹ All documents belonging to the Court should be authenticated by the Seal of the Court bearing 'The *Shari'ah* Court of Appeal'. The Seal, printed in the English, Hausa and Arabic languages, should be kept by the Registrar though a duplicate thereof could be kept by his Deputy³⁰.

All officers of the *Shari'ah* Court of Appeal are to abide by the rules made by the Grand Kadi as conferred upon him by section 25 of the *Shari'ah* Court of Appeal Law. Such officers are adequately protected by the law when exercising their lawful duties in that regard.

No officer of the Court or other person bound to execute any warrant or order issued by the Court shall be liable in any action for damages in respect of the execution of such warrant or order unless it be proved that he executed the same in an unlawful manner.³¹

4.1.3 Court Buildings

Business of the *Shari'ah* Court of Appeal is mostly conducted in courtrooms. Some specific functions are however performed in the offices of the Kadis of the Court, the Registrars and other Court personnel. Being an arm of the State Judiciary, the *Shari'ah* Court of Appeal often shares the same premises with the High Court and the Inspectorate Divisions of the Area Courts as practised in Kaduna State. New sets of building have been recently completed for the Judicial Arm of the government in Sokoto, Maiduguri and Kano. Sokoto and Maiduguri buildings share the same features with that of Kaduna. In them, all the three arms of the judiciary are accommodated in the same building with distinct offices and separate courtrooms for the High Courts and the *Shari'ah* Court of Appeal. In Kano, the *Shari'ah* Court of Appeal (with offices and courtrooms) was built adjacent to the High Court building complex which additionally accommodates the inspectorate division of the Area Courts. The two sets of building are demarcated with separate fences. In terms of office and courtrooms as well as other physical infrastructural requirements, Borno, Kaduna, Kano and Sokoto States *Shari'ah* Courts of Appeal are well equipped.

In Kwara State, a magnificent building is under construction for the High Court division of the judiciary which conducts its daily business, at present, in a temporary site, the premises of the old Divisional Court. The *Shari'ah* Court of Appeal has also identified its permanent site and two modern courtrooms and some offices have been erected at the site to accommodate its staff on a temporary basis. The construction of magnificent structures comparable to those of the High Court division is equally planned for the *Shari'ah* Court of Appeal. In Gongola State, the High Court and the *Shari'ah* Court of Appeal divisions are accommodated in different locations as in Kwara State. The *Shari'ah* Court of Appeal division in Yola is occupying the premises of the old Provincial Court which should have been occupied by the Upper Area Court.

Bauchi and Niger States *Shari'ah* Courts of Appeal share identical features in this regard. They are accommodated in different places with the High Court division as in Kwara and Gongola States. The *Shari'ah* Courts of Appeal are located in places which look like old local government secretariats while the High Court divisions are occupying the old Provincial Court premises.

Benue/Plateau States *Shari'ah* Court of Appeal is unique in terms of accommodation. It is occupying a rented building which is not conspicuous for easy identification by strangers in Jos. By way of comparison, it is the worst accommodated in the State among the superior courts in Jos. It is also the worst accommodated in comparison to other States *Shari'ah* Courts of Appeal. In Abuja, we understand that construction is in progress at Gwagwalada for the Federal Capital Territory *Shari'ah* Court of Appeal.³²

4.2 Jurisdiction and Law of the *Shari'ah* Court of Appeal

The jurisdiction of the *Shari'ah* Court of Appeal in Northern Nigeria was limited to regional matters prior to 1967. It heard appeals from the lower courts on questions regarding 'Moslem personal law'.³³ It had legal right to exercise the powers, authority and appellate jurisdiction conferred upon any Native Court under sections 65, 67 and 68 of the Native Courts Law.³⁴ The Court also had the power to review cases reported to it by any Inspector of Area Courts.³⁵ In such a circumstance, the Court had to comply with the provisions of section 52 of the Native Courts Law as discussed in Chapter Three.³⁶ With the creation of States in 1967 and the subsequent modification of the then existing Laws by which regional matters became State matters by virtue of States (Creation and Transitional Provisions) Decree (No. 14 of 1967), jurisdiction of the Regional *Shari'ah* Court of Appeal became the jurisdiction of States' *Shari'ah* Courts of Appeal.

Since its establishment in 1960, the *Shari'ah* Court of Appeal had no original jurisdiction in any cause of matter.³⁷ It could only review or rehear a case brought before it as discussed above. Up to the time of writing this work, no *Shari'ah* Court of Appeal had the power to hear a case at the first instance whereas the High Court of a state used to have and still has original jurisdiction in some causes and matters.³⁸ Many of the *Shari'ah* law personnel whom we interviewed supported the idea of granting original jurisdiction to the *Shari'ah* Courts of Appeal. Some others who held reservations on giving the Court original jurisdiction argue that the High Courts were given original jurisdiction because appeal cases from the Magistrates' and Area Courts to the High Courts were few; and that appeals from the Area Courts to the *Shari'ah* Courts of Appeal were many. This argument may be valid in the past, but of recent, available records have shown that appeals that lie in High Courts from the lower courts, particularly the Area Courts, are more than those that lie in the *Shari'ah* Courts of Appeal.³⁹ We therefore believe that if the *Shari'ah* Courts of

Appeal could be conferred with original jurisdiction (in addition to its present appellate jurisdiction), the volume of litigation in time will increase like that of the High Courts. By so doing, the *Shari'ah* Courts of Appeal will be able to justify government spending and finances on them.

4.2.1 Jurisdiction Over Subject Matters

Jurisdiction of the *Shari'ah* Court of Appeal over subject matter did not change considerably with time. The same causes and matters over which it exercised jurisdiction under section 11 of the *Shari'ah* Court of Appeal Law in the 1963 Laws of Northern Nigeria had been re-enacted in section 242 (2) of 1979 Constitution with only the change of 'Moslem Law' wherever it occurred in the former to 'Islamic (Personal) Law' in the latter. Of recent, the 1979 Constitution has been amended by 'Constitution (Suspension and Modification) (Amendment) Decree' (No. 26 of 1986) with the deletion of the word 'personal' wherever it occurs after the word 'Islamic' in Islamic (personal) Law. This amendment has corrected the rendering of 'Moslem law' in sections 11 and 14 of *Shari'ah* Court of Appeal Law as 'Islamic (Personal) Law' in the 1979 Constitution; whereas the correct rendering should have been 'Islamic Law'. The 1979 Constitution provides that the Court is competent to decide:

- a. any question of Islamic (Personal) Law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
- b. where all the parties to the proceedings are Moslems, any question of Islamic (Personal) Law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;
- c. any question of Islamic (Personal) Law regarding a *waqf*, gift, will or succession where the endower, donor, testator or deceased person is a Moslem;
- d. any question of Islamic (Personal) Law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or
- e. where all the parties to the proceedings (whether or not they are Moslem) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic (Personal) Law, or any other question⁴⁰.

Jurisdiction of the *Shari'ah* Court of Appeal has thus been limited to issues pertaining to family relationship. However, section 'e' is unique; for it confers jurisdiction upon the *Shari'ah* Court of Appeal in 'any other question' and whether or not the

Table XII: Statistics of Cases Tried by Bauchi, Gongola, Kaduna and Sokoto States *Shari'ah* Courts of Appeal from 1980 to 1985, Distributed According to the Different Aspects of the Jurisdiction of the Court

Year	State	Divorce	Paternity	Custody of Children	Waqf	Gift	Will	Succession	Maintenance of Muslims	Others	Total
1980	Bauchi Gongola Kaduna Sokoto	18	13	2	-	3	2	16	2	22	78
		7	-	-	-	-	-	4	-	-	11
		19	3	7	-	-	1	48	-	-	78
		32	6	4	-	10	-	50	-	35	137
1981	Bauchi Gongola Kaduna Sokoto	21	12	1	-	6	-	22	-	-	62
		16	-	-	-	-	-	10	-	-	26
		17	3	1	-	-	1	49	-	-	70
		38	8	4	-	12	-	60	3	15	140
1982	Bauchi Gongola Kaduna Sokoto	25	17	-	-	9	4	27	4	-	86
		15	-	-	-	-	-	8	-	-	23
		27	2	-	-	2	-	58	-	-	89
		35	8	6	-	13	-	58	-	15	135
1983	Bauchi Gongola Kaduna Sokoto	30	26	-	-	-	5	36	-	-	100
		26	1	1	-	-	-	13	-	-	41
		26	1	-	-	-	-	53	-	-	80
		40	10	10	-	15	-	40	15	20	150
1984	Bauchi Gongola Kaduna Sokoto	41	32	3	-	1	6	39	1	-	123
		16	-	-	-	1	-	9	-	-	27
		41	1	-	-	-	-	70	-	-	112
		56	15	15	-	20	-	100	16	35	257
1985	Bauchi Gongola Kaduna Sokoto	53	42	-	-	8	9	41	5	-	158
		5	-	-	-	-	-	7	-	-	12
		40	1	1	-	1	-	102	-	-	145
		40	15	10	-	20	-	60	3	28	171

parties to the suit are Muslims. This is a right direction. The following table shows the different aspects of the jurisdiction of the *Shari'ah* Court of Appeal as quoted above and the number of cases determined on each aspect in selected States' *Shari'ah* Court of Appeal from 1980 to 1985.

As regards the recommendations of the 1976 Area Courts Reform Committee that 'other matters governed by Islamic law which are now subject to the jurisdiction of the High Court be vested in the *Shari'ah* Court of Appeal⁴¹, it has been consequently entrenched in the 1979 Constitution that the *Shari'ah* Court of Appeal can be conferred with additional jurisdiction by the law of the state:

The *Shari'ah* Court of Appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it by the law of the state, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic (personal) law which the Court is competent to decide in accordance with the provisions of sub-section (2) of this section.⁴²

By this, the *Shari'ah* Court of Appeal of a state shall be competent to exercise appellate and supervisory jurisdiction in civil proceedings as listed in sub-section (2) of section 242 of the Constitution but additionally, it shall be competent to exercise any other jurisdiction as may be conferred upon it by the Law of the State.

Towards guiding the State Legislatures on the conferment of such additional jurisdiction on the *Shari'ah* Courts of Appeal, we conducted random interviews. Response of the Chief Inspectors of Area Courts to the interview suggested that all civil appeals from the Area Courts should lie in the *Shari'ah* Court of Appeal. A few of them suggested further that even some criminal cases like adultery and theft should equally be recommended to go on appeal to the *Shari'ah* Court of Appeal. Majority of them opined that in addition to cases on family relationship, other civil cases like those on land matters, sales and contract should also go on appeal to the *Shari'ah* Court of Appeal. Similar views were held by the Grand Kadis whom we interviewed. They raised the issue of present conflict in jurisdiction between their courts and the High Courts. At present, to remove such a conflict, they suggested that all civil appeals from the Area Courts should go to the *Shari'ah* Court of Appeal as all criminal appeals should lie in the High Court. They argued convincingly that ideally, their courts should try some criminal cases but the present criminal law does not allow for the application of Islamic penalties.

It has been observed that, instead of the jurisdiction of the *Shari'ah* Court of Appeal on subject matter to increase, it is reducing. First, prior to the coming into effect of the 1979 Constitution and subsequent to the publication of the Government White Paper on the 1976 Area Courts Reform Committee Report in 1977, Kano State amended her Laws in 1978⁴³ to widen the jurisdiction of her *Shari'ah* Court of Appeal. In 1979, Justice Dahiru Musdapher, the then Acting Chief Judge of Kano State decided a case, *Alhaji Abdulsalam Muhammed v. Ra'biu Kofar Mazuga*⁴⁴, in which he declared those amendments to Kano State Laws 'invalid and of no consequence in so far as their provisions attempt to give the *Shari'ah* Court of Appeal jurisdiction other than those regarding question of moslem law of personal status...' It was a case for a transaction in a shop in Sabon Gari market in Kano which should have been covered by section 11(e) of the *Shari'ah* Court of Appeal Law. The honourable Justice cited many references to support his judgement. He was of the view that sub-section (1) of section 242 of the 1979 Constitution should be limited to other matters 'of moslem law of personal status not mentioned in sub-section 2 of section 242 (1)'. He relied on other sections of the Constitution like s.223 (1) which empowers the (Federal) Court of Appeal to determine civil proceedings from the *Shari'ah* Court of Appeal 'with respect to any question of Islamic (personal) Law which the *Shari'ah* Court of Appeal is competent to decide'.

Second, we have mentioned *Umaru Fannami v. Bukar Sarki* (1985)⁴⁵ among the cases that had adverse effect on the application of *Shari'ah* law in Nigerian courts. The three learned Justices of the (Federal) Court of Appeal who decided the case upheld the view that section 242 (2) of the 1979 Constitution, upon which the case rested at the Borno State *Shari'ah* Court of Appeal, did not confer any additional jurisdiction of the *Shari'ah* Courts of Appeal outside matters of Islamic (personal) law.⁴⁶ With these two judgements, no *Shari'ah* Court of Appeal could exercise any jurisdiction except section 11 (a) – (d) of the *Shari'ah* Court of Appeal Law, 1963, which has been re-enacted as section 242 (2) (a) – (d) in the 1979 Constitution.

We sought the views of the Grand Kadis on these judgements and on the interpretations of section 242 (1) of the 1979 Constitution in relation to sub-section (2) thereof. A few of them agreed with the above judgements of the Kano State High Court (1979) and of the (Federal) Court of Appeal (1985) that sub-section (1) of section 242 of the 1979 Constitution has been rendered obsolete by the specification in sub-section

(2) thereof. That notwithstanding, majority of them argued that section 219 and 244 of the Constitution have countered section 223 (1) upon which Justice Dahiru Musdapher relied in his judgement. We were however made to understand that the controversy over this jurisdiction was caused by the word 'Personal' which was used to describe the law to be applied in the *Shari'ah* Court of Appeal. Thus, all the Grand Kadis had contentiously as a group agitated for the deletion of that word from the Constitution so that the law of administration in the Court shall be 'Islamic Law' which will be all-embracing. Now that the prayers of the Grand Kadis had been answered⁴⁷, jurisdiction of the *Shari'ah* Court of Appeal over subject matter must have been widened to some extent. However, Kaduna State High Court has, of recent, ruled in another case, *Hajiya Laila Dogon Yaro v. Alh. Jimoh Bello*⁴⁸ that the jurisdiction of the *Shari'ah* Court of Appeal has not been expanded by the removal of the word 'Personal' from 'Islamic Personal law' in the 1979 Constitution (as amended in November 1986). That notwithstanding, we have not come across the interpretation of that aspect of the amendment decree by any Justice of the Court of Appeal till the time of submitting this work. We believe that the revised edition of 1979 Constitution which may become operative in 1992 will solve this controversy⁴⁹.

4.2.2 Laws Applied

The *Shari'ah* Court of Appeal is empowered to administer, observe and enforce the principles and provisions of:

- a. Moslem law of the Maliki school as customarily interpreted at the place where the trial at first instance took place;
- b. this law (i.e. *Shari'ah* Court of Appeal Law);
- c. the Native Courts Law and any other law affecting native courts in so far as it appertains to a cause or matter within section 11 of this Law; and
- d. natural justice, equity and good conscience.⁵⁰

These variety of laws enhance and complement one another. The *Shari'ah* Court of Appeal Law mentioned in 'b' and the sections of the Native Courts Law relevant to section 11 of *Shari'ah* Court of Appeal Law mentioned in 'c' (i.e. sections 65, 67 and 68 as discussed above) were based on the Maliki codes of Islamic law. Our discussions on these laws therefore centre on 'a' and 'd' in which Maliki school doctrines and 'natural justice, equity and good conscience' were provided respectively.

The provision of Maliki codes for application in the *Shari'ah* Court of Appeal indicates the prevalence of *Taqīd* (dogmatic imitation) in

the courts; whereas many Muslim countries of the modern world have engaged in the exercise of neo-*Ijtihad* in their courts.

The 1979 Constitution does not specify which codes of Islamic law should be applied by the *Shari'ah* Courts of Appeal, Maliki or non-Maliki. Its section 242 prescribes the application of 'Islamic (Personal) Law' and this can be the doctrine of any Islamic school of law. However, a State Legislature can still prescribe the Maliki codes when conferring additional jurisdiction upon the *Shari'ah* Court of Appeal as empowered by section 242 (1) of the Constitution. The administrators of *Shari'ah* law are in a dilemma on whether or not the Laws administered in Islamic courts should be confined to only the Maliki codes. Some interviewed Grand Kadis expressed support for modernism in Islamic law, at least the exercise of *Takhayyur*; some of them supported the application of only the Maliki codes while some others expressed their belief in the necessity for neo-*Ijtihad*, but argued that Nigeria has not yet developed to the stage of applying it; hence they preferred the retention of only the Maliki codes. The last group maintained that: (i) in contemporary Nigeria, there is the need for uniformity in the laws applied by the *Shari'ah* Courts (including the lower Area Courts); (ii) whereas the provisions of the different schools of Islamic law are lenient in some areas and harsh in some other areas, to exercise *Takhayyur* may harm some parties to a suit or favour some others; and (iii) it will be unfair, as it is an element of injustice for a lower court to apply the code of a school and for a superior court (in hearing the appeal) to apply the code of another school, etc. They argued that Maliki law is comprehensive enough for the need of Nigerian *Shari'ah* Courts and that if the need to apply the codes of another school should arise, the *Ijtihad* of the *Salaf* in that original school must first be exhausted.

The law officers who insisted on the application of only the Maliki codes argued that the present Kadis are *Maqullidun*⁵¹ while those who supported neo-*Ijtihad* maintained that before a person can be qualified to become a Kadi, he must have been a *Mujtahid*⁵² rather than a *Muqallid*. We observe that the latter group's assertion is supported by the following extract from *Tabsirah*, viz.

... لا تصح ولاية الجاهل. قال ابن شاس: ولا المقلد

إلا عند الضرورة. قال القاضي أبو بكر: فيقضي بفتوى مقلده بنص النازلة.

Translation:

The appointment of an ignoramus is not lawful. Ibn Shas added that a *Muqallid* is equally unfit except under

necessity. Justice Abu Bakr (then) observed that such a *Muqallid* will deliver judgement with the legal decision of his mentor (blurtantly) as it may come down to him.⁵³

In applying the Maliki codes, the clause ‘as customarily interpreted at the place where the trial at first instance took place’⁵⁴, should be strictly observed. Various schools of Islamic law emerged due to divergencies in the culture of the people in the areas of domicile of the founders. Sub-sections (b) and (c) of section 14 of the *Shari’ah* Court of Appeal law should therefore be understood in the light of that clause. However, any custom that runs counter to the Quranic and prophetic teachings must be regarded unlawful while those that conform with them are accepted under the *Shari’ah*. As such, the only valid aspect of sub-sections (b) and (c) of section 14 in question is that which conforms with the dictates of the Qur’an, and the *Sunnah* of the Prophet Muhammad or any other which is not repugnant to the two teachings.

Sub-section (d) of the applicable laws under consideration provides for the application of ‘natural justice, equity and good conscience’. The interpretation of this law according to our understanding is the application of logic in examining the custom of people towards the determination of the lawfulness or otherwise of their native law under the *Shari’ah*. However, majority of *Shari’ah* law administrators whom we interviewed abhorred its application under the *Shari’ah* while some of them equated it to *Masalih Mursala* or *Istihsan*, etc. Which are ancillary sources of Islamic law. Dr Hassan Ibrahim Gwarzo, however, argued convincingly that the application of the term ‘natural justice, etc’ is relative to individual judges.⁵⁵ For example, the practice of restricted polygyny is part of ‘natural justice’ in Islam but otherwise in English law. Similarly, amputation of the limb of a thief is part of justice in Islam but abhorred in the English system. As the English system considers only the pains to be suffered by the thief whose limb is being amputated, Islamic law considers the welfare and well-being of all members of the society. Dr Gwarzo thereby recommended the deletion of that sub-section (d) from section 14 of *Shari’ah* Court of Appeal Laws.

Whereas the *Shari’ah* Courts of Appeal have not been applying a codified form of *Shari’ah* law and whereas the Maliki School doctrines are predominantly applied in such courts, we present in the following table, names of some frequently consulted legal manuals by the Kadis. The books were written by lawyers and jurists of the Maliki School. The table also contains the relevant pages to the jurisdiction of the *Shari’ah* Courts of Appeal.

Table XIII: Selected Legal Manuals⁵⁶ on the Maliki School Doctrines with Relevant Pages to the Jurisdiction of the *Shari'ah* Courts of Appeal

Jurisdiction	<i>Al-Adawi</i> vol. II; pages	<i>Al-Azhari</i> vols. I & II; pages	<i>Ad-Dasuki</i> vols. II - IV; pages	<i>AlKashnawi</i> vols. II & III; pages	<i>Mayarah</i> vols. I & II; pages
Marriage	33-71	I 274-330	II 214-347	II 67-137	I 152-217
Divorce	71-105	I 330-384	II 347-468	II 137-182	I 217-249
Paternity (Including <i>Iddah</i> and <i>Hadanah</i>)	105-125	I 384-410	II 468-534	II 182-219	I 249-277
Succession and Will	204-228 and 344-365	II 328-340	IV 456-498	III 271-345	II 294-315
<i>Waqf</i> and Gift	228-263	II 205-221	IV 75-129	III 87-112	II 125-197
Business Transaction	125-204	II 2-204	III 2-550 and IV 2-75	II 219-384 and III 2-87	II 227-331 and II 2-125

4.2.3 Transfer of Cases to and from High Court

In order to avoid miscarriage of justice, the *Shari'ah* Court of Appeal Law provides that cases which may be misplaced should be transferred to the appropriate Court before their determination.⁵⁷ For the same purpose, section 63(1) and (2) of the High Court Law was enacted:

1. In the exercise of its jurisdiction under section 62, the High Court shall be constituted of three members, two of whom shall be judges of the High Court and one of whom shall be a judge of the *Shari'ah* Court of Appeal.
2. The member of a court constituted in accordance with sub-section (1) who is considered by a majority of the members of such court to have the greatest knowledge of the law to be administered in a particular appeal shall preside at the hearing of such appeal.

This provision has however been abrogated by *M. Ado, Hajia Rabi'u v. Hajia Dije*⁵⁸. The learned Justices of the (Federal) Court of Appeal ruled that section 63 of the High Court Law (quoted above) was inconsistent with section 238 of the 1979 Constitution which provides that the constitution of a High Court of a state shall be 'at least one Judge of that court'⁵⁹.

Consequently, Kadis of the *Shari'ah* Courts of Appeal in all the Northern States have ceased to partake in the business of

the High Courts of Appeal. Cases of Islamic subject matter are thereby suffering in the High Courts and yet, the judges have not been transferring them to the appropriate *Shari'ah* Courts; rather, they prefer the appointment of assessors from the judges of Area Courts. A proper solution to this problem is the amendment of the 1979 Constitution by which such suffering cases will be put under the jurisdiction of the appropriate courts. Majority of the people interviewed opined that all civil cases determined by the Area Courts should lie on appeal in the *Shari'ah* Court of Appeal. Additionally, we observe that the *Shari'ah* Courts of Appeal should be conferred with criminal jurisdiction, at least in some causes and matters relating to the family, defamation and drunkenness.

Statistics of cases tried by the *Shari'ah* Courts of Appeal suggest the necessity for reform in the system of case distribution between the Courts and the High Courts on the one hand and a reconsideration of the retention or otherwise of the Upper Area Court as an appellate court interjecting appeals that should lie in the *Shari'ah* Courts of Appeal on the other hand. The following events vindicate our observation in this regard:

1. With the promulgation of Kano State *Shari'ah* Court of Appeal Edict (No.6), 1978 by which the Court's jurisdiction was widened, it was able to determine 627 cases in 1978, 579 in 1979, and 657 in 1980 before the judgement of Justice Dahiru Musdapher in *Alhaji Abdulsalami Muhammad v. Rabi'u Kofar Mazuqal* (Dec. 1979) declared the amendment to the Edict inconsistent with some provisions of the 1979 Constitution. Thereafter, the annual case returns of the Court continued to decrease in number. It recorded 124 cases in 1981 and only 85 in 1982.
2. With the amendment to Kwara State Area Courts Edict in March 1986 by which cases of Islamic subject matter tried by the Area Courts should lie on appeal direct in the *Shari'ah* Court of Appeal rather than passing through the Upper Area Court, the number of cases recorded in the *Shari'ah* Court of Appeal increased tremendously. The court which determined 20 cases in 1971, 14 in 1972, 19 in 1973, 19 in 1974, 22 in 1975, 13 in 1976 and 13 in 1977 totalling 117 in the seven years, recorded 114 cases in 1986 (January – December), a figure less than what she determined in the previous seven years (1971-1977) by only 3.
3. In an unreported case tried by Benue/Plateau States *Shari'ah* Court of Appeal – *Ali Muhammadu and Taminu*

Mohammed v. Kasimu Na Ta'ala (1985),⁶⁰ the transfer of the case to the High Court would not have arisen if the *Shari'ah* Court of Appeal had been given criminal jurisdiction at least as regards matrimonial issues. The Upper Area Court from where the appeal lay in the *Shari'ah* Court of Appeal treated the case as a criminal one under section 384 of the Penal Code. The *Shari'ah* Court of Appeal observed that the issue at stake was: who was the legal husband of the woman according to Islamic law? Had the Upper Area Court Judge investigated that, he would not have treated the case as a criminal one; and had the *Shari'ah* Court of Appeal been conferred with criminal jurisdiction regarding matrimonial issues, it would have been able to correct the mistakes of the lower court and it would not have been necessary for her to refer the case to the Chief Judge for further directives. It has therefore become desirable to confer criminal jurisdiction upon the *Shari'ah* Courts of Appeal in a number of cases in addition to the appropriate civil jurisdiction.

Whereas by virtue of section 15 (1) and (2) of *Shari'ah* Court of Appeal law, both the Grand Kadi and the Chief Judge of a State have the power to transfer cases, we observe that constant joint meetings of all the Grand Kadis and the Chief Judges may be necessary for the purpose of solving this problem of transfer of cases. Instead of the Chief Judge and the High Court Judges of the respective states appointing assessors from the retired Area Court judges, they should let justice prevail by recommending appropriate amendments to the 1979 constitution on the jurisdiction of their courts vis-à-vis the jurisdiction of the *Shari'ah* Courts of Appeal.

4.3 Practice and Procedure of the *Shari'ah* Courts of Appeal
The practice and procedure of the *Shari'ah* Courts of Appeal which are regulated by sections 17 to 26 of the *Shari'ah* Court of Appeal Law on the one hand and orders I to XIV of the subsidiary legislation to the same law on the other hand have not been abrogated by the 1979 Constitution which approved them as follows:

The *Shari'ah* Court of Appeal of a State shall exercise the jurisdiction vested in it by this constitution or by any law in accordance with the practice and procedure from time to time prescribed by the House of Assembly of the State.⁶¹

Whereas many people have written extensively on the practice and procedure of the *Shari'ah* Courts, particularly as found in various books on Islamic jurisprudence like those contained in Table XIII and Table XIV, we feel that it is necessary to avoid duplication. Furthermore, the 1976 Area Courts Reform Committee had suggested a codified form of Islamic law of procedure and appended a model of it to its Report as earlier discussed, and subsequent to that Report, Sokoto State had enacted a law on the same Islamic law of procedure which we have appended to this work (Appendix III). Not only that, J.N.D. Anderson and N.J. Couslon have also described in detail the Islamic law of procedure and evidence in pages 58 to 60 of their work (1967).⁶² Lastly and more importantly, Sulaiman Kumo's Ph.D. thesis focused on the same Islamic law of practice and procedure as contained in traditional legal manuals with detailed comparison with the practice in Northern Nigeria lower courts when applying *Shari'ah* law. He treated the topic in not less than 200 pages (pp.153 – 377) of a thesis containing 400 pages. Our focus in this regard therefore centres on the interpretation of the relevant sections and Orders of the *Shari'ah* Court of Appeal Law which are applicable to that court, being a court of superior record.

4.3.1 Sessions of the Court

The Governor-in-Council is empowered to regulate the sessions of the *Shari'ah* Court of Appeal.⁶³ He has the power to appoint the place or places within which the session or sessions should be held. However, if it appears to the Grand Kadi that 'there is no business or no substantial amount of business to be transacted at a session' he may 'by order direct that sessions shall not on that particular occasion be held at that place'.⁶⁴ It is however mandatory that 'Notice of every order' made in this regard either by the Governor or the Grand Kadi be published in the state's official gazette.⁶⁵ Such publication should be caused by the Registrar of the Court.

Notice of the date, time and place of the commencement of a session of the court together with a cause list of the cases to be heard at such session shall be published by the Registrar of the Court in the ... Gazette not less than three weeks before the date appointed for the session⁶⁶.

In practice, the Grand Kadi decides the place, date and time of sessions. He initiates and forwards his recommendation to the Attorney-General of the State who causes it to be published in the Gazettes which should carry the signature of the

Governor as being approved.⁶⁷ Appended herewith is a table (Appendix VI) showing the towns in which sessions are held in each State – since Courts' sittings are no longer confined to State capitals. The table also carries the names and posts of the Chief Registrars or their representatives, in compliance with Order II, Rule I. Copies of the schedules from which the Appendix was culled were forwarded to the Ministry of Justice in the respective States for publication in the Gazette and to all the *Shari'ah* Courts of Appeal in Nigeria for notification. The schedule for Sokoto State *Shari'ah* Court of Appeal in 1977 was published in Sokoto State Gazette No. 6 vol. 10 dated 23 December 1976 while the first session was scheduled for Monday 17 January 1977 at Gusau (Appendix V). This means that notice of the session was published twenty-five days to the beginning of the session – an adequate compliance with the three weeks minimum notice.

4.3.1 Appeal Procedure

An aggrieved person with the judgement of a court below can appeal to the *Shari'ah* Court of Appeal in form of a written petition to the appeal court, or through oral or written indication for an appeal, to either the Registrar of the court below or its judge –in-court. When the Registrar of the *Shari'ah* Court of Appeal receives such an appeal, he shall make an entry of it in the registry of his court. He will then send a notice of the appeal to the court below, requesting for a certified copy of the record of the case which should be sent to him within one month.⁶⁸ The Registrar of the *Shari'ah* Court of Appeal must be conversant with the mode of appeal as per Order III, Rule 3 which directs that every appeal shall be entered either:

- a. in the form of a petition in writing presented by the appellant or some person duly authorised to do so on his behalf; or
- b. with the permission of the court, by the appellant dictating his prayer to the Registrar or other officer of the court; or
- c. by the appellant stating orally his prayer to the court; and the appellant shall, unless the court otherwise directs, attach to the petition or produce to the Registrar or the court as the case may be, a copy of the order or decision appealed against.⁶⁹

This presupposes that the *Shari'ah* Court of Appeal shall receive two copies of the record of proceedings of the lower courts, one from the appellant and another from the court below.

The Registrar of the *Shari'ah* Court of Appeal shall cause the appellant to leave his postal address with the court or to be calling personally or send his authorised representative to do the same from time to time for the purpose of collecting any notice or other communication meant for him in respect of the case.⁷⁰ The appellant should also be caused to provide security for any cost and he should deposit such with the court within one month.⁷¹ A single Kadi of the court can make an order for that security.

An appeal shall be entered by the Registrar of the *Shari'ah* Court of Appeal within thirty days from the date of the order or decision appealed against.⁷² However, there is room for appeal out of time. The *Shari'ah* Court of Appeal is empowered to enlarge an appeal out of time before hearing.⁷³ Every application for enlargement out of time should be supported by:

- a. an affidavit or affirmation or declaration having in law the effect of an oath setting forth good and substantial reasons for the application; and
- b. grounds of appeal which *prima facie* shall give cause for leave to be granted.⁷⁴

As soon as an appeal has been duly filed at the *Shari'ah* Court of Appeal, the Registrar should set in motion, all necessary grounds for its hearing. He should communicate the date, venue and time of the court's sitting to hear the appeal to all parties concerned; make required number of copies of the record of the case from the court below, and make internal arrangements for the sitting of the court on the appeal.⁷⁵

4.3.3 Hearing Procedure

Hearing of any case by the *Shari'ah* Court of Appeal must be guided by the procedure of Islamic law as contained in the legal manual.⁷⁶ The hearing must be in an open court but the court has the power to exclude members of the public 'where it appears that the administration of justice would be rendered impracticable' with their presence.⁷⁷ Other guidelines on how to proceed with the hearing of the case are as follows:

1. At the hearing of the appeal, the court shall peruse the record of the case made in the court below.
2. The court shall not normally rehear or retry the case; but if it shall be necessary for the purpose of elucidating or amplifying the record of the court below and arriving at the true facts of the case, the court may rehear or retry the case in whole or in part and may:

- a. allow, or require witnesses to be called, whether or not they gave evidence before the court below;
 - b. order any reference to be made;
 - c. call for any document or other exhibit;
 - d. inspect any object or place;
 - e. call for and examine all original records of the court below;
 - f. adjourn the hearing from time to time and place to place;
 - g. do or order to be done anything which the court below has power to do or order; and
 - h. generally exercise any of the powers conferred upon it by section 10 of the law.
3. The parties or their representatives may address the court in support of their respective cases and in the course of any such address may read the whole or any part of the record of the court below and may comment thereon.
4. The party who begins shall have a right to reply to the speech of the party or parties opposing him.⁷⁸

These provisions indicate the simplicity of procedure under Islamic law. It is devoid of technicalities which govern the English system of procedure. In fact, section 16 of the *Shari'ah* Court of Appeal law provides that 'any case transferred to the High Court shall not be questioned on the ground that it has not been entered within the time prescribed for entering appeals to the Court', a recognition of non-technicalities in the procedure of Islamic law. The following table contains the names of some legal manuals written by jurists of the Maliki school and which are widely consulted by the Kadis of the *Shari'ah* Court of Appeal. It also contains references to the Islamic practice and procedure as discussed in such books:

Table XIV: Selected Legal Manuals on the Maliki School Doctrines with Relevant Pages to the Practice and Procedure of the *Shari'ah* Courts of Appeal

Practice and Procedure	<i>At-Tusuli</i> vol. I pages	<i>Farhun</i> vols. I & II pages	<i>Al-Khirshi</i> vols. IV and V pages	<i>Al-Hattab</i> vols. V & VI pages	<i>Al-Ju'ali</i> vol. II pages
Judicial Procedure <i>(al-Qada')</i>	12-86	I: 11-184	V: 137-175	VI: 86-150	II: 195-201
Evidence (including witnesses and Oath) <i>ash-shahadat /alyamin</i>	86-166	I: 184-427 and II 2-132	V: 175-244	VI: 150-230	II: 202-207
Representation /Agency <i>al-wakalah</i>	199-219	I 154-159	IV 284-302	V: 181-216	I 160-163
Arbitration/ Compromise <i>(as-Sulh)</i>	219 - 234	II 36-39	IV 218-232	V: 79-90	

N.B. *al-Khirshi* and *al-Hattab* are commentaries on the popular *Mukhtasar Khalil*.

4.3.4 Representation in the Court

Representation of any party to a suit by a legal practitioner was disallowed by section 20 of the *Shari'ah* Court of Appeal Law. Only an accredited relative of a litigant who was incapacitated to attend the court could represent him; and a native authority could be represented by any of its officers.

1. No legal practitioner may appear to act for or assist any party before the Court.
2. In any proceedings before it the Court may permit the appearance on behalf of any party to such proceedings of:
 - a. the husband, wife, guardian, servant, master or any inmate of the household of any party, who shall give satisfactory proof that he or she has authority in that behalf; or
 - b. a relative of any person who is interested in the administration of the estate of a person who was subject to the jurisdiction of a native court.
3. Subject to the provisions of sub-sections (1) and (2) in any suit pending before the Court, a native authority may be represented at any stage of the proceedings by any officer of the native authority who shall satisfy the Court that he is duly authorised in that behalf.⁷⁹

In this regard, a distinction has been made between legal and ordinary representations. The disallowing of a legal practitioner from practice in the *Shari'ah* Court of Appeal was not unconnected with the fact that early legal practitioners in Nigeria were not learned in the *Shari'ah*. After all, lawyers called *Muhamum* (sing. *Muham*) do practice in Islamic courts of other countries of the Muslim world. Such practices are allowed under the application of *Siyasah ash-Shariyyah*. Towards the recognition of such practices, the 1976 Area Courts Reform Committee recommended the establishment of a *Shari'ah* 'College of Advocates' in Nigeria – an admission into which shall be regulated 'by a committee of experts in the *Shari'ah* who shall serve as 'Benchers' for this class of advocates'.⁸⁰ The Federal Government noted this recommendation in its White Paper on the Committee's Report and directed the Attorneys-General in the States concerned to 'consider the issue and recommend appropriately, as early as possible'⁸¹. The Attorneys-General have not made any efforts towards the establishment of the recommended *Shari'ah* College of Advocates till the time of writing this work.

Recent developments on the appearance of lawyers in any court in Nigeria require an urgent establishment of a *Shari'ah* College of Advocates. In a case, *Karimatu Yakubu and Alhaji Mahmoud Ndatsu v. Alhaji Yakubu Tafida Paiko and Alhaji Umaru Gwagwada* (1985)⁸², it was argued that by virtue of section 33 (1) and (13) (a) of the 1979 Constitution, a legal practitioner has a right to appear for any party in any suit under proceedings in any court of law in Nigeria.

Thus, section 20 of the *Shari'ah* Court of Appeal Law has been rendered null and void for its inconsistency with the provisions of the 1979 Constitution of the Federal Republic of Nigeria (Appendix VIII contains the Judgement).

Through interviews, we discovered that the reasons for disallowing lawyers to practise in the *Shari'ah* Courts of Appeal by some Kadis of the Court include the lawyers' attitude of delaying the trial of cases by requesting for adjournments, charging exorbitant fees from poor clients and concern only for their fees with little or no genuine interest to assist the clients.⁸³ Majority of the *Shari'ah* personnel in the *Shari'ah* Courts of Appeal observed that legal representation in their courts would be tolerated to the extent of the Islamic provisions for *Wakil*, pending the establishment of the recommended *Shari'ah* College of Advacates.⁸⁴ They argued that they are not scared of legal representation. After all, not only a relative of a party to the suit could represent him under section 20 of the

Shari'ah Court of Appeal Law, rather the representation of a native authority by any of its officers was also allowed. This was a form of exercising *Siyasah ash-Shari'iyah* as other Muslim countries allowed the appearance of *Muhami* in their courts. If legal representation should continue in the *Shari'ah* Courts of Appeal, let the legal practitioners pass through a *Shari'ah* College of Advocates.

4.3.5 *Ex parte* Judgement

After the Registrar of the *Shari'ah* Court of Appeal must have served summons to all concerned in a suit, if the appellant or his representative fails to appear in court on the day fixed for hearing, the respondent may apply for the case to be struck out and the court may grant his prayer.⁸⁵ If, on the other hand, the respondent is indifferent to the appellant's absence in that circumstance (by putting forward no application for the case to be struck out), the court may grant an adjournment if it so wishes.⁸⁶ On granting an adjournment, the court should notify the appellant of the new date fixed for the hearing of the appeal. Such adjournment may also be granted if the respondent or his representative puts forward an application for it, whether or not the appellant is present in court. If neither the appellant nor the respondent, nor their representatives appear in court on the day fixed for the hearing of their case, the court may on its own motion strike out the case.⁸⁷ So shall the case be struck out if the appellant or his representative fails to appear for the second time, and it is proved to the court that 'summons was duly served in time'.⁸⁸ Any case struck out by the court may, however, be re-opened if the court later became satisfied with the reasons given by the appellant for his earlier absence, provided the time of giving the reason and time the appeal was struck out did not exceed fifteen days.⁸⁹

The last paragraph has discussed the grounds to be considered by the *Shari'ah* Court of Appeal in adjourning or striking out a case before it. Meanwhile, the law has provided that, failure on the part of the respondent or his representative to appear in court on the day fixed for the hearing of an appeal; the court can give judgement *ex parte* if it is satisfied that summons has been duly served on him and if he has no reasonable ground for his absence⁹⁰. If, on the other hand, the court is not satisfied that the first summons has been duly served on the respondent or his representative, it can issue a fresh summons⁹¹. In that wise, the grounds for his failure to appear earlier in court would be regarded reasonable and

tenable. Another ground for which a case can be decided *ex parte* is where the subject matter of the suit is related to questions of 'maintenance' or 'divorce' in which the respondent and his representative are absent from court and their whereabouts are unknown or they are in a place where a summons cannot be served on either of them⁹².

Our research on the validity or otherwise of *ex parte* judgement under Islamic law reveals that every case has to be treated on its own merit. Delivery of judgement *ex parte* will thus be valid or invalid according to the nature of the case before the court. Islamic law books are replete with specific different procedures for the different cases according to subject matter⁹³. According to some of the Grand Kadis we interviewed⁹⁴, delivery of judgement *ex parte* is mostly practised in cases of loss of husband, inheritance and unconsummated marriage. The following extract from *Tuhfah* refers to the validity of *ex parte* judgement:

وَمَنْ أَلَدَّ فِي الْخِصَامِ وَاتَّهَجَ فَهَجَ الْفِرَارِ بَعْدَ إِتْمَامِ الْحُجَجِ
يُنْفَذُ الْحُكْمُ عَلَيْهِ الْحُكْمُ قَطْعًا لِكُلِّ مَا بِهِ يَخْتَصِمُ
وَعَبْرٌ مُسْتَوْفٍ لَهَا إِنْ اسْتَرَى لَمْ تَنْقَطِعْ حُجَّتُهُ إِذَا ظَهَرَ
لَكِنَّا الْحُكْمَ عَلَيْهِ يُمَضَى بَعْدَ تَلَوُّمٍ لَهُ مَنْ يَقْضِي

Translation

Whenever one transgresses in a dispute and flees (from Court) after the completion of all proofs (of his guilt), the judge shall summarily pass judgement on every count of the charge against him.

Should he abscond before the completion of necessary investigations to prove his guilt, judgement shall still be passed on him (if found guilty) but after procrastination⁹⁵.

This means that if all facts are gathered and the summons is duly served to the satisfaction of the court, judgement can be delivered *ex parte*. A sample case in this regard is *Ya'a Ali and Abubakar v. Alhaji Kasumu Na Ta'ala* (1985)⁹⁶. The respondent in the case was absent from the court which was satisfied that summons was served him through Lafia Area Court P⁹⁷. The case involves the paternity of a 30-day-old baby. Ya'a Ali filed an *ex parte* motion in the *Shari'ah* Court of Appeal, Jos, praying for stay of execution of the decision of the court below in case No. CV/1093/85. He stated many grounds in support

of his motion among which was the rush of the other party to make some tribal marks on the cheeks of the baby in dispute. In its ruling, the *Shari'ah* Court of Appeal ordered for a stop in enforcing the judgement of the court below, observing that determination of paternity is a serious case and that the court should not allow a 30-day-old baby to be taken away from the mother. This judgement is valid, not only by virtue of the above quoted extract from *Tuhfah* but also by virtue of Order III Rule 8 of the subsidiary legislation to *Shari'ah* Court of Appeal Law which empowers the court to stay the execution of the judgement of the court below from where the appeal is lying, whether or not the respondent or the appellant appears in court. Such an order can be at the request of the appellant and it shall remain in force until the determination of the appeal.

Finally, although *ex parte* judgement is valid under the *Shari'ah*, it is seldom practised in the *Shari'ah* Court of Appeal. When practised, it is with caution. Majority of the interviewed law administrators maintained that after a judgement had been delivered *ex parte*, if the absent party later emerges with tenable reasons for his absence in the first instance, the earlier *ex parte* judgement must be set aside and the hearing of the case should re-open⁹⁸.

4.3.6 Evidence in the Court

Before the *Shari'ah* Court of Appeal proceeds with the hearing of an appeal or during it, requests shall be made to both parties for submission of the names of their witnesses⁹⁹. The court shall consequently send summons to such witnesses for appearance at the time they will be needed to testify before it. Neither the appellant nor the respondent shall be entitled to call any other witness apart from those in the list already submitted to the court unless a satisfactory reason is given 'for having omitted to name such witness in the first instance'¹⁰⁰. This idea of submitting a list of witnesses is purely Western. It was entrenched in the *Shari'ah* Court of Appeal Law as part of *Siyasah ash-Shariyyah* in the opinion of Alhaji Yahya Kanem¹⁰¹. All the interviewed Grand Kadis agreed that before a case is closed, the judge must ask the parties if they have more submissions or more witnesses and that if the answer is in the affirmative, the hearing should continue. Alhaji Haliru Binji added that even if a witness should appear for a litigant after the delivery of judgement under certain conditions, the judgement may be eventually reversed after re-hearing¹⁰².

The Law of Evidence under the *Shari'ah* is important for every *Qadi* to master. It is a wide area of study under the Islamic

law of procedure. Each matter or cause in Islamic law has its distinct procedure on evidence. Islamic law of evidence covers over 200 pages in volume I of *Tabsiratu-’l-Hukkam* and about 100 pages in its Volume II.

Order VIII, Rule 1(3) provides that the two parties to a suit can be caused to make provisions for the journey of their respective witnesses and to pay compensation to them for loss of time or the like in coming to testify on their case. This research has led us to confirm that such provisions are legal under the *Shari’ah*. *Tuhfah* provides as follows:

وَأَجْرَةُ الْعَوْنِ عَلَى صَاحِبِ حَقٍّ وَمَنْ سِوَاهُ إِنْ أُلِدَّ تُسْتَحَقُّ

Translation

Cost of assistance (to the judge in serving summons etc.) should be borne by the plaintiff/appellant; but if the other party is hesitant (to appear in Court), he should be made to bear the cost¹⁰³.

Both Alhaji Haliru Binji of Sokoto State and Alhaji Abdulmalik Bappa Mahmud of Bauchi State referred to the above quotation and its interpretation in *Mayarah* in support of the legality under the *Shari’ah* for each party to a suit to pay the cost of transport of his witnesses to the court, plus the provision of a moderate maintenance for each witness during the period.

The Chief Inspector of Area Courts in Bauchi, Gongola, Kano, Niger and Plateau States observed that each party to the suit provides for such costs in a civil suit but the government provides for it in a criminal case. In recent years however, the government has been dropping proposed allocations for such costs in the annual budget of the Area Court arm of the judiciary¹⁰⁴. Furthermore, if the court invites a professional in a job to give an expert evidence in a case, be it civil or criminal – the court is morally bound to compensate him.¹⁰⁵

Whenever a witness is invited into the witness box, the court shall ask him questions relating to the case like his name, profession or occupation, residence, and his connection with the parties to the suit if any – by relationship, employment or otherwise.¹⁰⁶ He shall then be requested to give the account of what he knows in relation to the suit. The court shall then test the validity of his submissions through further questions like the time, place and manner by which he acquired the knowledge of his submissions, or any other questions the court may think fit.¹⁰⁷ After the court has been satisfied that the witness cannot give further evidence to elucidate on the suit, the party against whom any evidence is given may, through the

court, put some questions to the witness.¹⁰⁸ Such questions as he may deem necessary should be relevant to the suit, otherwise the court has the right to disallow him further questions or reject it. Finally, the court shall record all questions put to a witness either by the court or by the party against whom the witness was called and the answers of the witnesses.¹⁰⁹

4.3.7 Judgement and Execution

The *Sharī'ah* Court of Appeal, having satisfied itself of all facts about the case before it, can deliver its judgement in the open court where all parties to the suit shall be present. In that wise, there shall be no need for the court to send the notice of the judgement to any party thereto. However, the terms of the court's order should be brought to the notice of any party who was absent and had no delegated representative at the court during the proceeding in which a judgement was delivered.¹¹⁰ Quite as the court can enforce the execution of its orders after the determination of a case, it can still delegate the court below wherefrom the appeal lies to effect such orders on its behalf, and it is always advisable to implement the latter.¹¹¹ The following table contains the number of cases decided by the *Sharī'ah* Courts of Appeal from 1980 to 1985. Benue/Plateau and Borno States *Sharī'ah* Courts of Appeal did not respond to our questionnaire hence nothing is recorded for them.

Table XV: Statistics of Cases Decided by the *Sharī'ah* Courts of Appeal: 1980 to 1985 by State

State	1980	1981	1982	1983	1984	1985	Total
Bauchi	78	62	86	100	123	158	607
B/Plateau	-	-	-	-	-	-	-
Borno	-	-	-	-	-	-	-
Gongola	11	26	23	41	27	12	140
Kaduna	78	70	89	80	112	145	574
Kano	627	124	85	58	90	81	1,095
Kwara	46	42	36	22	30	43	219
Niger	26	28	26	29	33	38	180
Sokoto	137	140	135	150	257	171	990

The foregoing is a testimony of the autonomy of the *Sharī'ah* Court of Appeal to regulate its proceedings according to the provisions of the *Sharī'ah* herein incorporated in the *Sharī'ah* Court of Appeal Laws, 1963. The Court has the autonomy to prescribe the fees which an appellant should pay before his appeal is registered. All the necessary steps to be taken by the appellant are regulated by the Court¹¹².

Such steps and many other Rules of the Court are made by the Grand Kadi with power vested in him by section 25 of the laws. Letters of the section provide that the Grand Kadi is empowered to make Rules for:

- a. Prescribing and providing for:
 - i. the fees which may be charged in the court;
 - ii. the reduction of such fees in any particular case or class of cases and the manner in which and the persons by whom such reduction may be made;
 - iii. the remission in whole or in part of any fee or reduced fee and the manner in which and the persons by whom such reduction may be made;
- b. subject to the provisions of section 14, the practice and procedure of the court;
- c. the carrying into execution of the decrees or orders of the court;
- d. the execution of the warrants and the service of the process of the court;
- e. regulating the payment of allowances and travelling expenses of witnesses;
- f. regulating any matters relating to the costs of proceedings in the court;
- g. defining, so far as conveniently may be defined by general rules, the duties of the several officers of the court;
- h. securing the due administration of estates;
- i. requiring and regulating the filing of accounts of the administration of estates;
- j. ascertaining the values of estates;
- k. regulating and prescribing the procedure on appeals from any native court to the court;
- l. regulating the sittings of the court subject to the provisions of sections 17, 18 and 19;
- m. prescribing what part of the business which may be transacted and of the jurisdiction which may be exercised by judges of the Court and may be transacted or exercised by the registrar or other officers of the court, and providing that any interlocutory application to be made in connection with or for the purpose of any appeal or proposed appeal to be heard by the Court shall be heard and disposed of before a single judge;
- n. prescribing forms to be used for the process and procedure of the Court; and
- o. generally for carrying into effect the provisions of this law.

Power of the Grand Kadi to make these rules is legally derived through *Siyasah ash-Sharʿiyyah* and we deem it a stepping-stone

towards the codification of *Shari'ah* Law Practice and Procedure. The interviewed Grand Kadis on the desirability or otherwise of codifying Islamic law, with particular reference to the above quoted section 25 of the *Shari'ah* Court of Appeal Law, opposed the idea of codification. Both Alhaji Haliru Binji and Yahya Kanem opined that section 25 of the Law under reference as well as the Sokoto State Area Courts Amendment Edict on procedure are provided only to guide judges and not as codified laws.

Codification of *Shari'ah* law was argued to be undesirable. The major constraints are the respectability to the native law and custom – as long as such custom is not repugnant to the teachings of the Qur'an and the *Sunnah*. Drawing an example from Nigeria, Shaykh Abubakar Mahmoud Gumi wondered which of the Nigerian customary laws would be adopted when codifying Islamic law: Yoruba, Hausa, Ibo, etc.¹¹³ Using the legal manuals as example, Shaykh Ahmad Lemu would like to know which of the books would be used as yardstick at the neglect of others: *Bah jah*, *Mayarah*, *Hashiyatu'd – Dasuki*, *Hashiyatu 'l – Adawi*, etc.¹¹⁴ Furthermore, Bashir Sambo wondered as to which part of any chosen book would be used as basis of the codification: the text, the commentary, or the glosses?¹¹⁵ It was argued that all these problems were envisaged by the prophet Muhammad when he declared that difference of opinion among his community was a blessing.¹¹⁶ It was tenaciously upheld by the Grand Kadis that codification of Islamic law is dangerous¹¹⁷, since the exercise – if successful – will render the Kadis lazy¹¹⁸, culminating into ignorance, whereas ignorance is a disease.¹¹⁹

Codification of Islamic law is good *per se* when considered on its own merit but the fact that the nature of cases vary from one to another makes it difficult for codification.¹²⁰ Actually, time is not ripe for the codification; when the time comes, the Jurists (Fuqaha') should engage in the exercise rather than the politicians in the gown of legislatures.¹²¹ Yet, only the law of procedure should be codified¹²²; and it must be in the Arabic language.¹²³ Many people are indeed pessimistic about the success of the codification of *Shari'ah* law¹²⁴, and thus there is danger in the present exercise of translating *Tuhfah* into Hausa language as a step towards the codification of the law.¹²⁵ Even the codified laws in Egypt according to the teaching of each of the four schools of law in Islam are found to be defective, for they are not comprehensive enough for the use of judges in that country¹²⁶. Such works include:

(1) مشروع الشريعة الإسلامية على مذهب الإمام مالك (1972)

(2) مشروع الشريعة الإسلامية على مذهب الإمام الشافعي (1975)

and others which were prepared by the authorities of al-Azhar, Cairo.

Libya, Tunisia, Pakistan and many other countries of the Muslim world have inadvertently violated some divine injunctions in the Qur'an in the process of codifying the *Shari'ah* law¹²⁷. The idea of codifying Islamic law is Western in origin and has no basis in Islam¹²⁸. It will be recalled that when Muslims were expanding their laws, Europe and the West were at the yoke of striving for civilisation¹²⁹.

It can be concluded from the above arguments that as long as there are divergent views of scholars on one and the same matter or issue within the same single school of law, judges must be given the freedom to choose which of the divergent views suits their local environment in deciding the cases before them. The use of opinions expressed in the legal manuals which are not yet codified should be allowed to continue at least for the time being in Nigeria.

To further buttress the above conclusion, we are aware that the respective requests of Abu Ja'far al-Mansur and Harun ar-Rashid to hang the *Muwatta* of Imam Malik on the Ka'bah (for universal application) were rejected by the author¹³⁰; as we are aware that the suggestion of Abdullah b. Al-uqaffa' to Abu Ja'far al-Mansur on the codification of Islamic law was turned down on the basis of the earlier refusal of Imam Malik to allow the *Muwatta* be hung on the Ka'bah¹³¹. We are equally aware of the limitations of the first and second versions of the codified Islamic law by Awrangzeb 'Alamgir in 1100 AH and the Ottomanic/Egyptian Majallahs of 1876.¹³²

In spite of all the sound logical opinions and the precedent of the *Salaf* against the codification of Islamic law presented above, we still believe that the advantages of codification are too numerous to count in this modern age. The expressed difficulties inherent in the exercise can be disentangled by determination, courage and relentless efforts.

Codification of the salient opinion expressed by the different writers in the most widely consulted legal manuals is possible, though it may take some time. The exercise can be undertaken by a team of experts in the *Shari'ah* legal practice, dividing the subject matters among themselves. Such experts should concern themselves with the principles of the law while the judges-in-court must be left to interpret such principles according to the dictates of their local norms and custom. After all, minor

differences of opinion expressed in the different legal manuals were caused by the divergences in the custom of the localities of the writers. Such differences are immaterial as long as the principles of the law they are interpreting remain uniform. Codification of such principles is desirable. The desirability becomes manifest as we discuss below the *Shari'ah* legal practice in the (Federal) Court of Appeal. Furthermore, the surviving schools of Islamic law sprang up with the divergent views on the various matters after the demise of the prophet Muhammad. Hitherto, there were no different schools of law. Reversion to that unity in the Muslim world can only be achieved through the codification of the principles of Islamic law. *Kitab al-Fioh 'ala al-Madhahib al-Arba'ah* was written towards that unity. The type of codification we envisage is the collation of the different opinions in form of a concordance as done to selected works on the *Hadith* in *al-Mu'jam al-Mufahris Li Alfaz al-Hadith an-Nabawi* (1955).

4.4 *Shari'ah* Law Reporting

Law reporting is beneficial, not only to the lawyers and judges but also to students of law. The Centre for Islamic Legal Studies in the Institute of Administration, Ahmadu Bello University, Zaria, has meritoriously published two volumes of *Shari'ah* Law Reports in 1980 and 1985. The 1980 edition contains fifteen cases while the 1985 edition contains only five cases. The cases are reported in both the English and Hausa languages in each volume. The following table shows the distribution of the reported cases as collected from the States *Shari'ah* Courts of Appeal.

Table XVI: Statistics of Reported Cases in 1980 and 1985 Editions of *Shari'ah* Law Reports by States

State	1980	1985	Total
Bauchi	3	3	6
Benue/Plateau	3	-	3
Borno	5	-	5
Gongola	-	-	-
Kaduna	1	-	1
Kano	-	2	2
Kwara	-	-	-
Niger	1	-	1
Sokoto	2	-	2
Total	15	5	20

References were made to not less than 20 legal manuals of the Maliki School of Islamic Law, some of which are mentioned in Table XIII and XIV above. Some others include:

1. *Sa'ad Shumus*
2. *Akrabu 'l Masalik Vol. II*
3. *ath-Thamaru 'd-Dani*
4. *Bulgatu 's-Salik Vol. I*
5. *al-Fawa-kihu 'd-Dawani*
6. *Kurratu 'Ayn Vol.I*
7. *al-Ah-Kamu 'sh-Shariyyah Fi 'l-Usuli sh-Shakhsiyyah*
8. *Badru 'z-Zawjayn*
9. *Mukhtasar Khalil; and*
10. *Tuhfatu 'l-Hukkam*

Reference was made to *Mayarah* eleven times in the reported cases while *ad-Dasuki* was cited eight times. *Jawahiru 'l-Iklil* were referred to seven times, as both *Bahjah* and *Mawahibu 'l-Jalil* were cited four times each. *Tabsiratu 'l Hummam* was quoted three times while each of all others was cited once. The maxim *al-Walad li 'l-firashi* was quoted in one case without citing any legal manual. *Subulu 's-Salam Vol. III pp. 210-213* could have been cited for the maxim. The following samples of the references are from the three most consulted legal manuals as revealed by the reported cases.

لم يبد وجه الحكم أن ينفذا وليس بالجانز القاضي إذا

Translation

It is not desirable for a judge to determine a case until all ambiguities surrounding it are cleared.¹³³

Reference to this quotation was wrongly made to page 27 of *Mayarah in Salihu Na Kabo v. Asma'u K. Maimako (1978)*.¹³⁴ The extract was appropriately applied in the case. It warns the judge against deciding cases before the completion of investigations.

Reference was made to page 223 of *Hashiyatu 'd-Dasuki, Vol. II* in which the different categories of virgin daughters upon whom fathers cannot exercise compulsion in Marriage (*Ijbar*) are discussed. The reference as contained in *Alhaji Isa Bida v. Baiwa Daughter of Alhaji Isa Bida (1971)*¹³⁵ was correct, accurate and appropriate.

وصدقت في انقضاء عدة الأقراء والوضع بلا يمن

Translation

A woman counting her *'Iddah* by menstrual cycle may be believed on its completion without requesting her to take an oath, likewise a pregnant woman on delivery.¹³⁶

A mere reference to the page in *Jawahiru 'l-Ilkil* was made in *Muhammadu Bida and Amina v. Muhammadu Dwafu* (1978).¹³⁷ The reference should have indicated that the quotation was a direct text of *Mukhtasar Khalil* and not the commentary of al-Azhari on it. Not only that, the second to the last word of the extract was inadvertently rendered (v:) as against the correct (v). The subject matter is a complex one which warrants clarification. It directs the court to admit the statement of a woman who is undergoing *'Iddah* of a revocable divorce and not of one who has already married another man after the *'Iddah* – on the completion of her *'Iddah* without necessarily forcing her to take an oath as regards that completion. The complexity of this subject lies in the fact that the legal manual explains further some possible areas of causing some selected women to testify to the authenticity of the menstruating woman's claim that she had completed her *'Iddah*. To stop at mere stating that such a woman should be trusted by the court in that regard without explaining further the other possibilities may be misleading.

Lastly, the summary of each reported case in the two volumes of the *Shari'ah* Law Reports is appended to this work (Appendix VII). It gives a clear picture of the cases so reported. Meanwhile, we consider below, *Shari'ah* Legal Practice in the (Federal) Court of Appeal.

4.5 *Shari'ah* Law in the (Federal) Court of Appeal

The (Federal) Court of Appeal was established by Constitution (Amendment) (No. 2) Decree (No. 42) of 1976 as discussed in Chapter Two.¹³⁸ It had no jurisdiction in *Shari'ah* matters until 1979 when sections 217, 218, 219, 223, 226 and 227 of the 1979 constitution were enacted with sub-sections (where necessary) to cater for *Shari'ah* causes and matters. Whereas the historical background to the court's establishment had been discussed in Chapter Two,¹³⁹ our focus in this section shall be on the digest of relevant *Shari'ah* statutes to the administration of justice in the court.

4.5.1 *Shari'ah* Personnel in the Constitution of the Court

The (Federal) Court of Appeal should consist of not less than 15 Justices and not less than three of them must be learned in the *Shari'ah* law.¹⁴⁰ As at the time of writing this project, four Justices of the Court have been identified as learned in the *Shari'ah*. They are:

1. Justice Abubakar Bashir Wali of Kano State¹⁴¹
2. Justice Uthman Mohammed of Sokoto State
3. Justice Umaru Maidama of Sokoto State; and
4. Justice Sani Salith Aikawa of Kano State.

The Constitution of the Court for the purpose of exercising any jurisdiction conferred upon it by 'the 1979 Constitution or any other law' shall be a minimum of three Justices of the Court.¹⁴² Thus, if the court consists of less than three Justices in exercising its jurisdiction, its judgement would be null and void, being contrary to the provisions of the Constitution of the Federation. *Shari'ah* cases have been adequately catered for with the availability of the four Justices of the Court mentioned above. In the copies of some judgements of the Court within our reach, it has been discovered that at times, four Justices are learned in Islamic (Personal) Law and at times only three of them would hear appeals from the *Shari'ah* Court of Appeal. This practice conforms strictly with the provisions in sub-section (a) of section 226 of the 1979 Constitution which stipulates that appeals from the *Shari'ah* Court of Appeal should be heard if the (Federal) Court of Appeal 'Consists of not less than 3 Justices... learned in Islamic (Personal) Law...'

Appointment of the Justices of the (Federal) Court of Appeal shall be made by the President of the Federal Republic of Nigeria 'on the advice of the Federal Judicial Service Commission' but the appointment of the Court's President must be approved by a simple majority of the Senate.¹⁴³ As regards the qualification of a justice of the Court, he must be qualified as a legal practitioner in Nigeria with not less than 12 years post-qualification experience.¹⁴⁴ We have observed in Chapter Two¹⁴⁵ that this provision of 'being qualified as a legal practitioner in Nigeria' has *ipso facto* disqualified the well experienced Kadis of the *Shari'ah* Courts of Appeal from being appointed Justices of the (Federal) Court of Appeal except a few of them (if any) who passed through the Nigerian Law School or its approved equivalent. The constitution shall need to be amended in this regard. Suggestions and recommendations are contained in Chapter Six.

4.5.2 *Shari'ah* Jurisdiction of the Court

By virtue of section 219 of the 1979 Constitution of the Federal Republic of Nigeria, the (Federal) Court of Appeal can exercise appellate jurisdiction in all cases from the States' *Shari'ah* Courts of Appeal. The section stipulates that:

Subject to the provisions of this constitution, the (Federal) Court of Appeal shall have jurisdiction, to the exclusion of any other court of law in Nigeria to hear and determine appeals from the Federal High Court, High Court of a State, *Shari'ah* Court of Appeal of a State and Customary Court of Appeal of a State.¹⁴⁶

This section can be interpreted to mean that the (Federal) Court of Appeal shall have the power to hear and determine

appeals involving criminal matters as may be decided by the *Shari'ah* Court of Appeal if such criminal jurisdiction should be conferred upon them. However, the *Shari'ah* Courts of Appeal are at present exercising civil jurisdiction only, hence all appeals from them that lie in the (Federal) Court of Appeal are on civil cases.

Section 223 of the 1979 Constitution specifies further – the jurisdiction of the (Federal) Court of Appeal as regards civil appeal cases from States' *Shari'ah* Courts of Appeal. The section clearly states that appeals in civil proceedings 'before the *Shari'ah* Court of Appeal with respect to any question of Islamic (personal) law which the *Shari'ah* Court of Appeal is competent to decide' shall lie in the (Federal) Court of Appeal.¹⁴⁷ By this, section 242 (2) of the 1979 Constitution which provides a list of matters which a *Shari'ah* Court of Appeal is competent to decide has been confirmed. On the controversy surrounding section 242(1) of the constitution, that a State *Shari'ah* Court of Appeal may be conferred with additional (including criminal) jurisdiction by the legislature of a state, section 223 (1) has not helped enough to solve the problem.

223 – (1) An appeal shall lie from decisions of the *Shari'ah* Court of Appeal of a State to the (Federal) Court of Appeal as a right in any civil proceedings before the *Shari'ah* Court of Appeal with respect to any question of Islamic (personal) law which the *Shari'ah* Court of Appeal is competent to decide.

The last phrase 'which the *Shari'ah* Court of Appeal is competent to decide' has been interpreted by Justice Dahiru Musdapher in *Alhaji Abdulsalami Muhammad v. Ra'biu Kofar Mazugal* (1979) to mean that the Court is competent to decide civil cases. As such, the *Shari'ah* Court of Appeal of a state is regarded competent to decide civil cases involving Islamic (personal) law in accordance with the scope set for it in section 242 (2) of the constitution.

4.5.3 *Shari'ah* Practice and Procedure in the Court

Section 223 (2) (b) of the 1979 Constitution empowers the (Federal) Court of Appeal to be governed by its own rules on a general note while section 227 of the same constitution is specific in providing that 'the President of the (Federal) Court of Appeal may make rules for regulating the practice and procedure of the (Federal) Court of Appeal'. Consequent upon these provisions, Justice M. Nasir, the President of the Court, made some rules on 9 April 1981.¹⁴⁸ Hitherto, these Rules had been enacted along with Federal Court of Appeal Decree in 1976 (Decree No. 43 of 1976) when the Court was first

established. The Decree, which was signed by General Olusegun Obasanjo (retired), became effective on 1 October 1976. Its content was a modified edition of the Rules of the Supreme Court. The relevant sections to the establishment of the (Federal) Court of Appeal in the Decree were re-enacted by an Act, published in Government Notice No. 534 of 1981. All cases lying in the Court thereby became governed by the provisions of both the Decree and the Act.

(Federal) Court of Appeal Rules were approved by Alhaji Shehu Shagari, the then President of the Federal Republic of Nigeria, on 18 May 1981. They are one hundred, and are arranged under six orders as follows:

Table XVII: Rules of the (Federal) Court of Appeal

Order	No. of Rules	Title of the Order
1	22	General Rules
2	4	References as to Constitution and Reserved Points of Law.
3	32	Civil Appeals
4	30	Criminal Appeals
5	8	Judgement
6	4	Miscellaneous

Though no single rule of the court is specific on *Shari'ah* Rules of Practice and Procedure, the court derives its authority to try *Shari'ah* cases with *Shari'ah* rules by virtue of section 16 of the Federal Court of Appeal Decree 1976. The section describes the General Powers of the court as follows:

The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgement in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken *and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance* and may rehear the case in whole or in part or may remit it to the hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below in that court's appellate jurisdiction, order the case to be reheard by a court of competent jurisdiction.¹⁴⁹ (emphasis is ours)

These general powers were re-enacted by the Act of 1981. That notwithstanding, we feel that a special rule may be made under Order 3 of the Court's Rules, stating in unequivocal terms, that cases from the *Shari'ah* Court of Appeal shall be heard and determined in accordance with *Shari'ah* Rules of Practice and Procedure. Such a Rule may be similar to Part One of Order XI of the Area Courts Civil Procedure Rules. This observation may be considered under the present structure of the court and pending the establishment of a separate (Federal) Court of Appeal as suggested later in this work.

Right of appeal to the (Federal) Court of Appeal from the decisions of any *Shari'ah* Court of Appeal has been constitutionally granted to any part to the suit. Not only that, the appeal can still be in order 'with the leave of the *Shari'ah* Court of Appeal or of the (Federal) Court of Appeal, at the instance of any other person having an interest in the matter...'¹⁵⁰ On hearing the appeal, the (Federal) Court of Appeal has the power to receive 'further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner as the court may direct...'¹⁵¹ The Court also has the power to strike out a case with the non-appearance of the appellant, though the struck out case may be relisted if the reason given for his non-appearance in the first instance is tenable.¹⁵² Similarly, non-appearance of the respondent may lead to hearing the case *ex-parte*.¹⁵³ All these provisions in the Rules of the Court confirm that elements of such Rules conform with *Shari'ah* provisions on practice and procedure. Yet, the above stated observations on the need for the prescription of pristine *Shari'ah* Rules of Practice and Procedure for the Court on the one hand and the creation of a separate Federal *Shari'ah* Court of Appeal on the other will still be valid, since such will allow for a neater organizational structure of the Nigerian courts.

4.5.4 *Shari'ah* Cases decided by the Court

The (Federal) Court of Appeal began to hear and determine *Shari'ah* cases in 1980, because the *Shari'ah* division of the court was established by virtue of the 1979 Constitution which came into force in October of the year. In 1980, the court decided a total of eleven *Shari'ah* cases from five States *Shari'ah* Courts of Appeal viz: one from Borno, Gongola, Kaduna and Kwara State respectively and seven from Kano State. At least each of the State *Shari'ah* Courts of Appeal (except Benue/Plateau) had one or more appeals decided by the (Federal) Court of Appeal between 1980 and 1983; Bauchi State had two cases, Borno three, Gongola two, Kaduna eight, Kano

seventeen, Kwara one, Niger one, and Sokoto six, totalling forty cases. Kaduna division of the (Federal) Court of Appeal was hearing all *Shari'ah* appeals prior to 1984. Thereafter, Jos division of the court started to hear *Shari'ah* appeals from Bauchi, Benue/Plateau, Borno and Gongola States *Shari'ah* Court of Appeal. The following table shows the statistics of *Shari'ah* cases that lay in the Kaduna division of the (Federal) Court of Appeal from 1980 to 1986.

Table XVIII: Statistics of *Shari'ah* Appeal that lay in the Kaduna Division of the (Federal) Court of Appeal: 1980 to 1986

State	1980	1981	1982	1983	1984	1985	1986	Total
Bauchi	—	2	—	—	—	—	—	2
B/Plateau	—	—	—	—	—	—	—	—
Borno	1	—	1	1	—	—	—	3
Gongola	1	—	1	—	—	—	—	2
Kaduna	1	3	3	1	—	—	3	11
Kano	7	5	2	3	11	4	2	34
Kwara	1	—	—	—	—	1	—	2
Niger	—	—	1	—	—	1	1	3
Sokoto	—	2	—	4	—	—	1	7
Total	11	12	8	9	11	6	7	64

Sample of decided cases were collected from Kaduna division of the Court for review. The collected judgements, mostly delivered in 1983, represent the jurisdiction of the *Shari'ah* Court of Appeal as contained in section 242 (2) of 1979 Constitution.

Alhaji Lirwanu Jumare v. Aishatu Sambo (1983)¹⁵⁴ may be considered as representing the jurisdiction contained in section 242(2) (a) of the constitution. It went on appeal from Zaria Upper Area Court to Kaduna State *Shari'ah* Court of Appeal and then to the (Federal) Court of Appeal (Kaduna division). In it, Aishatu wanted her release (*Khut*) on the allegation that her husband was making jest of her as being 'infertile'. She was unable to provide witnesses to support her claim. The lower Court adjourned the case several times to allow for reconciliation. In the long run, the husband released her. Alhaji Jumare had earlier indicated his wish at the lower court to claim certain amounts of money he spent on her including part of the *Sadaq*. He later changed his decision and wanted to claim only the cost of sending her on pilgrimage, waving the *Sadaq*. The Court eventually dissolved the marriage without Aishatu paying him any amount. He appealed to the *Shari'ah* Court of Appeal which, after examining the case, dismissed it and advised him to sue Aishatu in order to claim his expenses

on her, minus the *Sadaq* he had earlier waived. The appeal later lay in the (Federal) Court of Appeal which upheld the judgement of the *Shari'ah* Court of Appeal, making reference to page 97 of the *Risalah* of Ibn Abi Zaydd'l-Qayrawani on *Khul'*.

Two cases from Sokoto State may represent the jurisdiction contained in section 242(2) (b) of the 1979 Constitution. All the four justices, learned in the *Shari'ah* in the (Federal) Court of Appeal, decided it as they did in the case discussed in the last paragraph. They were both *Khul'* cases which originated from Upper Area Court, Sokoto, before lying on appeal in Sokoto State *Shari'ah* Court of Appeal and later in the (Federal) Court of Appeal, Kaduna. The two cases were alleged to have gone to the Supreme Court for final determination. They are *Nasara Sifawa v. A. Saidu Sifawa* (1983);¹⁵⁵ and *Hajia Kulu Wamakko v. Alhaji Malami Sokoto* (1983).¹⁵⁶ For the similarity in their grounds of appeal to the (Federal) Court of Appeal, we hereby review only one of the two i.e. the first mentioned.

In *Nasara Sifawa v. A. Saidu Sifawa* (1983), the wife was the plaintiff at the lower court. She was requesting the husband to grant her *Khul'* on the basis of cruelty. She called four witnesses, none of whom gave evidence in her favour. The judge relied on the provisions of law in *Mayarah*,¹⁵⁷ to send her back to the matrimonial home. Prior to that, many adjournments of the case had been made for possible reconciliation between the couple. Since she could not prove her allegation, the case was eventually dismissed. She appealed to the *Shari'ah* Court of Appeal which upheld the decision of the Court below. The case later lay in the (Federal) Court of Appeal and a lawyer appeared for her on many grounds, most of which called for her release by the husband or in alternative the court should set up a panel to arbitrate in the matter. The lawyer cited the following references to support his first claim that his client should be released: (i) page 97 of the *Risalah* (ii) Qur'an, 2:228 as contained in p. 89-90 of Muhammad Ali's translation, (iii) *Bukhari* Vol. V. pp. 149; (iv) *Journal of Islamic and Comparative Law* (JICL) Vol. I, No. 1 p. 30, containing the case involving *Fatima and Abu Sarki v. M. Jida*. He also cited Qur'an 4:35, on arbitration as alternative to the release of his client. The learned justices of the Court of Appeal delivered the judgement in favour of arbitration with the following directives:

That the case be remitted to the trial Upper Area Court, Sokoto, and before the same judge to follow the procedure of appointing a representative by each side.

The presiding justices observed that if the trial judge was not available to continue with the hearing as directed, the

trial should start *de novo*. They cited page 97 of *Ihkamu 'l Ahkam*, page 249 of *Fiqhu 's Sunnah* Vol. II, Qur'an, 4:35 and two cases earlier decided by the (Federal) Court of Appeal FCA/K/22s/80: *Baito Gyaranya v. Alhaji Shehu Warure* and FCA/K/25s/82: *Nafisatu Abeke Otte v. Alhaji Ismaila Omidoyin*.

Mamman Sambo Almaliri v. Hauwa Yar Yarogao (1983)¹⁵⁸ is a case that adequately represents the jurisdiction contained in section 242 (2) (c) of the 1979 constitution as applied by the (Federal) Court of Appeal. The case was first decided by Kalgo Area Court Judge. It went on appeal to an Upper Area Court, then to Sokoto State *Shari'ah* Court of Appeal and finally to the (Federal) Court of Appeal in Kaduna. The subject matter was 'gift and inheritance' and it was determined by the four experts in the *Shari'ah* among the Justices of the Court of Appeal. The husband of Hauwa died intestate, leaving seventeen cows, one upland farm, one lowland farm and two copies of the Holy Qur'an. The trial judge distributed nine out of the seventeen cows among the heirs, leaving the remaining eight which were controversial. By the time the case reached the Upper Area Court for determination, the controversial eight cows had multiplied to nineteen. As Hauwa was insisting that the nineteen cows be shared among the heirs, one Liman Umaru was submitting that the eight cows that multiplied to nineteen were offered by the deceased to his (Liman's) son as gift but unfortunately, the said son had equally died and he (Liman) had inherited his properties being his father. He concluded that, as such, the said cows belonged to him (Liman). Witnesses were called by the parties and at last Hauwa won. The nineteen cows were shared among the heirs of Hauwa's husband but the judge did not distribute other items. Appeal went to the *Shari'ah* Court of Appeal and the decision of the Upper Area Court was confirmed with further directives that other items yet to be shared be distributed to the heirs immediately. The aggrieved party appealed to the (Federal) Court of Appeal where the decision of the *Shari'ah* Court of Appeal was upheld.

We are unable to lay hands on any judgement of the court regarding the subject matter of section 242(2) (d). It is of note that cases on that section are seldom treated by the *Shari'ah* Court of Appeal.¹⁵⁹ Equally worthy of note is the controversy surrounding section 242 (2) (e) as earlier discussed.¹⁶⁰ However, a case was filed on the possession of three farms by loan but during its hearing, the farms were discovered to have been possessed by gift. For the dual nature of its subject matter, we summarise it as follows: *Muhammad Ahmed v. Dalhatu, Jibrin and Ya'u* (1982),¹⁶¹ was decided by Justice Abubakar Bashir Wali, Justice Uthman Mohammed and Justice Umar Maidama.

The case was first heard by the judge of Area Court I, Zaira. It went on appeal to Upper Area Court where the judgement of the lower court was confirmed. Later, it lay on appeal in the *Shari'ah* Court of Appeal where the decision of the lower courts was varied and it finally went to the (Federal) Court of Appeal where the decision of the *Shari'ah* Court of Appeal was confirmed. The appellant claimed that the farms of the three respondents were given to them on loan by his deceased father. The respondents severally denied his claim, submitting that the said father offered the farms to them as gift. A lawyer appeared for the appellant at the (Federal) Court of Appeal. His efforts to convince the learned Justices that the *Shari'ah* Court of Appeal lacked jurisdiction over the case failed. References quoted by the learned Justices of the Court in support of their decision include (i) *al-Hattab* Vol. V. page 182; (ii) *Ulaysh* Vol. II page 190; and (iii) *Mayarah* Vol. II page 172.

The (Federal) Court of Appeal upheld most of the decisions of the *Shari'ah* Courts of Appeal in the case sampled above. The court however set aside the decisions of the Sokoto State *Shari'ah* Court of Appeal in the two cases which were alleged to have lain on appeal in the Supreme Court.

Although the Justices of the Court have demonstrated adherence to the principles of the *Shari'ah* in those cases and some others, they found it difficult to apply *Shari'ah* law in some instances where the provisions of the 1979 Constitution over-ride the state law on the *Shari'ah*. Four cases decided by the court with such constraints are hereby reviewed.

- i. In *Alhaji Shehu Mohammed and 4 others v. Hajiya Amina* (1983),¹⁶² the judgement of Kaduna State *Shari'ah* Court of Appeal was set aside because it was delivered after the three months statutory period stipulated for the delivery of any judgement after the completion of the hearing – by any court set up under the constitution.¹⁶³ The (Federal) Court of Appeal discovered that the case was heard and determined by the *Shari'ah* Court of Appeal on 13/1/81 but adjourned to deliver the judgement on 4/5/81 and later signed the judgement on 6/5/81 – about three weeks after the three months stipulated by the constitution. It was therefore ruled that the case be 'remitted to the *Shari'ah* Court of Appeal, Kaduna, constituting a different panel to hear the appeal *de novo*'.
- ii. In another case, *M. Ado, Hajia Rabi v. Hajia Dije* (1983),¹⁶⁴ section 63 (1) of the Northern Nigeria High Court Law, 1963¹⁶⁵ was declared null and void because of its inconsistency with section 238 of 1979 Constitution. Unlike *Alhaji Shehu Mohammed and 4 others v. Hajia Amina*

(1983) which was decided by three of the Justices of the Court learned in the *Shari'ah*, this case was decided by five Justices only two of whom were learned in the *Shari'ah*: Justice M. Nasir, Justice Karibe Whyte, Justice D.O. Coker, Justice Abubakar Bashir Wali and Justice Umaru Maidama. The case which involved the sale of property inherited by the parties to the suit from their deceased Muslim parent went on appeal from Upper Area Court (No. 6) in Kano to the High Court. The appeal was heard by two judges of the High Court and a Kadi of the *Shari'ah* Court of Appeal in compliance with section 63(1) of the 1963 High Courts Law. An aggrieved litigant appealed to the (Federal) Court of Appeal, challenging the constitution of the High Court which decided the case on appeal. The court eventually ruled that the provisions of section 63(1) of the 1963 High Court Law was inconsistent with section 238 of the 1979 constitution which stipulates that:

For the purpose of exercising any jurisdiction conferred upon it under this constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court.

With this judgement, Kadis of the *Shari'ah* Court of Appeal have ceased attending appellate sessions of the High Courts as earlier discussed.¹⁶⁶

- iii. Form A.C.9 had been designed and used by the Northern Nigerian courts since 1960. Parties to a suit relating to section 11 (e) of the *Shari'ah* Court of Appeal Law used to complete it. The *Shari'ah* Court of Appeal, Maiduguri, heard and determined a case after the parties had duly completed the form which was a licence that the case should be determined according to Islamic law. Thereafter, appeal went to the (Federal) Court of Appeal with the argument that the *Shari'ah* Court of Appeal lacked jurisdiction over the matter. The (Federal) Court of Appeal decided the case – *Umaru Fannami v. Bukar Sarki* (1985),¹⁶⁷ with the observation that section 242(2) (e) of the 1979 Constitution which is the same as section 11 (e) of the *Shari'ah* Court of Appeal Law is not related to Islamic (personal) law which any *Shari'ah* Court of Appeal is competent to apply. Their view in this case is similar to the view of Justice Dahiru Musdapher in *Alhaji Abdul Salami Muhammad v. Ra'biu Kofar Mazugal* (1979).¹⁶⁸ Hence the section in dispute which confers jurisdiction on the *Shari'ah* Court of Appeal viz:

Where all the parties to the proceedings (whether or not they are Moslems) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic (personal) law, any other question¹⁶⁹

has been doubly declared null and void.

- iv. The case of *Karimatu Yakubu and Alhaji Mahmoud Ndatsu v. Alhaji Yakubu Tafida Paiko and Alhaji Umaru Gwagwada* (1985)¹⁷⁰ has annulled section 20(1) of the 1963 *Shari'ah* Court of Appeal Law by virtue of section 33(13)(a) of the 1979 Constitution. The case was heard on appeal by the *Shari'ah* Court of Appeal, Minna, before its registration with the (Federal) Court of Appeal, Kaduna. It was a case on *Ijbar* in which the *Shari'ah* Court of Appeal disallowed a lawyer to represent Karimatu on the ground that he (the lawyer) did not show evidence of knowledge of Islamic law procedure. The lawyer explained to the Kadis of the Court that his representation was based on section 33(2)(a) of the 1979 Constitution. When the appeal got to the (Federal) Court of Appeal, the learned Justices of the Court supported the argument of the appellant's counsel and upheld that section 33(13)(a) of the 1979 Constitution gives no court a right to exclude any legal practitioner from its proceedings be it criminal or civil. The leading Justice in the case explained further¹⁷¹ that section 274(1) of the 1979 constitution cannot apply to save section 20(1) of the 1963 *Shari'ah* Court of Appeal Law as an existing law. He relied on the interpretation of Justice Idigbe (JSC) on section 274(1) of the Constitution as contained in the proceedings of *F.S. Uwaifor v. The Attorney General of Bendel State and 4 others* 9 (1982).¹⁷² The twenty-four page record of proceedings of the (Federal) Court of Appeal on the case actually has not less than ten pages on the argument for legal representation in any court in Nigeria. By this judgement, a legal practitioner can appear in any court of law in Nigeria to represent any of the parties to a suit (Appendix VIII refers).

Judgement of the (Federal) Court of Appeal in the above four cases did not favour the application of *Shari'ah* law in the court: two cases (numbers (i) and (iv)) suffered due to some clear constitutional provisions while the other two (numbers (ii) and (iii)) equally suffered due to the interpretation of the relevant statutes to the cases by the learned Justices of the Court. It is worthy of note that, on the other hand, judgements of the Court in some other cases relating to the jurisdiction of the *Shari'ah*

Court of Appeal favoured the application of *Shari'ah* law (as discussed above). Meanwhile, we consider in the last section of this chapter, the place of *Shari'ah* law in the Supreme Court.

4.6 The Supreme Court and *Shari'ah* Law

The 1979 Constitution of the Federal Republic of Nigeria provides for appeals against the decisions of the (Federal) Court of Appeal to lie in the Supreme Court. Being the highest judicial tribunal in the country, 'no appeal shall lie to any other body or person from any determination of the Supreme Court',¹⁷³ hence the finality of the court's decision. The only way by which the decision of the court can be varied is through the exercise of prerogative of mercy by either the Governor of a State or the President of the Federal Republic of Nigeria. We hereby examine the fate of a *Shari'ah* case that may lie on appeal in the Supreme Court, the highest stage a case can go before it is put to rest.

4.6.1 Constitution of the Court and Appointment of Justices Learned in the *Shari'ah*

The President of the Federal Republic of Nigeria is empowered to appoint a Chief Justice of Nigeria and a number of Justices of the Supreme Court, not exceeding fifteen. Such appointment should be based on the advice of the Federal Judicial Service Commission on the one hand and 'subject to the approval... by a simple majority of the Senate' on the other hand.¹⁷⁴ Every appointed Justice of the Supreme Court must be qualified to practise as a legal practitioner in Nigeria and must have been 'so qualified for a period of not less than fifteen years'.¹⁷⁵

The Supreme Court shall be duly constituted to hear ordinary appeals if it consists of not less than five Justices of the Court. However, it shall be duly constituted if it consists of not less than seven Justices of the Court in the following circumstances:

- i. When exercising 'its original jurisdiction in accordance with section 212' of the 1979 Constitution,
- ii. When hearing appeals regarding the interpretation or application of the 1979 Constitution, and
- iii. When hearing appeals related to Chapter IV of the 1979 Constitution.¹⁷⁶

The President of the Federal Republic of Nigeria should ensure that there are among the Justices of the Supreme Court 'persons learned in Islamic personal law'.¹⁷⁷ Such a *Shari'ah* expert in the Court shall be deemed qualified:

- i. If he has attended and has obtained a recognised qualification in Islamic personal law from an institution approved by the Federal Judicial Service Commission

and has held the qualification for a period of not less than 15 years, and

- ii. If, in the opinion of the Federal Judicial Service Commission, he had considerable experience in the practice of Islamic personal law or he is a distinguished scholar of Islamic personal law.¹⁷⁸

In its present composition, only one Justice of the Supreme Court is adequately learned in Islamic personal law. Since the court shall be duly constituted to hear ordinary appeals when it consists of not less than five Justices of the court and whereas Justices learned in Islamic personal law may be appointed to hear and determine *Shari'ah* cases in it, it presupposes that such learned Justices to be appointed should not be less than five.

4.6.2 Jurisdiction of the Court and its Practice and Procedure

The Supreme Court has original jurisdiction in:

any dispute between the Federal and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends as well as in any other cause or matter as may be conferred upon it by an Act of the National Assembly.¹⁷⁹

The Court also has appellate jurisdiction as provided in sub-sections (1) to (6) of section 213 of the 1979 Constitution. Appeals lie in the Court from the (Federal) Court of Appeal.¹⁸⁰

By virtue of sub-section (5) of section 213 of the 1979 Constitution, *Shari'ah* cases decided by the (Federal) Court of Appeal can lie on appeal in the Supreme Court. The sub-section provided that any right of appeal to the Supreme Court from the decisions of the (Federal) Court of Appeal:

shall be exercisable in the case of civil proceedings at the instance of a party thereto or, with the leave of the (Federal) Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter...

Hence an aggrieved litigant with the decision of the Court of Appeal has a constitutional right to appeal to the Supreme Court. Now that the Supreme Court has not sufficient Justices learned in the *Shari'ah*, it shall be absolutely impossible for any aggrieved party with the decision of the (Federal) Court of Appeal in a *Shari'ah* case to get justice from the Supreme Court if he should appeal thereto. On the basis of this lacuna, we observe that there is need for the appointment of Justices learned in Islamic personal law for the Supreme Court.

Nasara Sifawa v. A. Saidu Sifawa (1983)¹⁸¹ and *Hajiya Kulu Wamakko v. Alhaji Malami Sokoto* (1983)¹⁸² were purported to have gone to the Supreme Court on appeal from Kaduna division of the (Federal) Court of Appeal. Records of the Supreme Court indicated that one of the two cases, *Hajiya Kulu Wamakko v. Alhaji Malami Sokoto* (1983), was actually registered as SC 10/1985 and that it was later struck out on 20 May 1985 when it was mentioned before the court. The honourable Justices dismissed it without cost after a motion for its withdrawal was tabled before them. As regards *Nasara Sifawa v. A. Saidu Sifawa* (1983), we understood ⁽¹⁸³⁾ that the parties later settled amicably out of court, hence no record of it could be found at the Supreme Court. We deem the dismissal of the only one *Shari'ah* case registered at the court as being in order as the court in its present composition is not competent to decide *Shari'ah* cases.

The Chief Justice of the Federation is empowered under section 216 of the 1978 Constitution to make rules for regulating the practice and procedure of the Supreme Court. We have discovered that no new Rules of the court have been made since the 1979 Constitution came into force. The Rules made by virtue of section 121 of the 1963 Constitution of the Federation of Nigeria are in force up till the present time. However, the application of those Rules which came into force on 1 September 1977 has the approval of the 1979 Constitution, viz:

Any right of appeal to the Supreme Court from the decision of the (Federal) Court of Appeal conferred by this section shall, subject to section 216 of this Constitution, be exercised in accordance with any act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Supreme Court.¹⁸⁴

Since the Supreme Court Rules, 1977 were for 'the time being in force' in 1979, when the new Constitution came into force, their application must be regarded valid until such a time when new Rules shall be made.

The Supreme Court Rules, 1977, contains 10 orders each with several Rules. Order 7 on the Court's appellate jurisdiction in civil appeals contains 36 Rules, none of which alludes to the *Shari'ah* Rules of Practice and Procedure. However, the Court has the power, like that of the (Federal) Court of Appeal, to exercise 'jurisdiction over the whole proceedings as if the proceedings had been instituted in the court' as Court of first instance. Thus, it can still apply *Shari'ah* Practice and Procedure. Yet, the fact that it does not have sufficient number of Justices learned in Islamic law robs it of the ability to try *Shari'ah* cases. As we observed under the (Federal) Court of Appeal, there is also need

for the review of the Rules of the Supreme Court to cater for *Shari'ah* Rules of Practice and Procedure *per se*. This observation may be considered along with the establishment of a separate *Shari'ah* Supreme Court as suggested in the concluding chapter of this work. Meanwhile, the next chapter examines in detail, the problems and prospects of the application of *Shari'ah* law in the contemporary and future Nigeria.

Notes on Chapter Four

1. Paragraph one of section 2.4.3 refers.
2. The Registrar used to invite selected Chief *Alkalai* from the Northern provinces – particularly those from Sokoto, Kano and Maiduguri – provided the cases to be heard were not from the Province of any invited *alkali*. (A.I. Doi, *Islam in Nigeria*, Zaria: Gaskiya Corporation Ltd. 1984 p. 211).
3. By virtue of section 26 of the new law, *Shari'ah* Court of Appeal took over all the pending cases in the Old Moslem Court of Appeal on 30 September 1960 (when the new law came into force).
4. Such include Law Nos 10 and 33 of 1962, 23 and 41 of 1963, and Legal Notices No. 7 of 1961 and No. 186 of 1963. All these enactments have been incorporated in Chapter 122 of the 1963 edition of the Laws of Northern Nigeria, published in 1965.
5. *Shari'ah* Court of Appeal Law (SCAL), 1963: s. 3 (1).
6. *Ibid* s. 3 (3)
7. *Ibid* s. 4 (1)
8. *Ibid* s. 4 (2)
9. *Ibid* s. 4 (3)
10. *Ibid* s. 7
11. *The Constitution of the Federal Republic of Nigeria (CFRN)*, 1979: s. 240(2) (a).
12. Section 240 (2) (b) of the Constitution provides for the appointment of 'such number of Kadis... as may be prescribed by the House of Assembly of the State'.
13. By 1986, Kaduna's Kadis of the *Shari'ah* Court of Appeal had reduced to three because two of them retired, one in 1984 and one other in 1985, while one was appointed the Grand Kadi of Abuja *Shari'ah* Court of Appeal in 1985.
14. *CFRN*, 1979: s. 243.
15. Between 1967 and 1975, such appointments were made by the Interim Common Services Agency for the Northern States of Nigeria.
16. The appointments are made on the advice of the Federal Judicial Advisory Committee.

17. SCAL, 1963: s. 5 (a) and (b).
18. The section provides a list of powers of the various sections that can make law and the extent to which such laws can be regarded valid – in relation to the ‘Existing Laws’.
19. SCAL, 1963: s. 6 (1)
20. CFRN, 1979: s. 255 (1)
21. SCAL, 1963: s. 6 (2)
22. *Ibid.* s. 5 (c)
23. CFRN, 1979: s. 241(3) (a) and (b)
24. SCAL 1963: s. 8
25. *Ibid.*: Order IX
26. Section 3.2.2 of this work refers.
27. SCAL, 1963: Order XII (1) and (2)
28. *Ibid.*: First Schedule (Forms 1-3)
29. *Ibid.*: Order XIV (1) and (2)
30. *Ibid.* s. 9
31. *Ibid.* s. 23
32. Interview with Justice Bashir Sambo, Grand Kadi of Abuja on 7 April 1984 at Abuja.
33. SCAL, 1963: s. 10 (1)
34. *Ibid.* s. 10 (2)
35. *Ibid.* s. 10 (4)
36. Section 3.5.3 of this work refers.
37. SCAL, 1963: s. 10 (3)
38. High Court Law (HCL), 1963: s. 14; and CFRN, 1979 ss. 236 and 237.
39. Statistics of cases and appeals from lower courts to the two superior courts are provided in section two of Chapter Five of this work.
40. CFRN, 1979: s. 242 (2)
41. *Federal Government Views on the Report of the Area Courts Reform Committee.* (FGVRACRC). Lagos: Federal Ministry of Information, 1977: p. 15
42. CFRN, 1979: s. 242 (1)
43. Kano State Edict Nos 6,8 and 9 of 1978
44. Unreported case No. K/56 A/79 of 9 December 1979.
45. Unreported case No. CA/3/16s/84 of 30 January 1985.
46. AbdulMalik Bappa Mahmud, ‘Brief History of *Shari’ah* in the Defunct Northern Nigeria’, 5 January 1986 p. 50
47. Because sections 217, 223(1), 226 (a), 241 (3) and 242 of the 1979 Constitution have been amended by which the word ‘personal’ has been deleted wherever it may occur after the word ‘Islamic’. This is contained in the Federal Republic of Nigeria Official Gazette No. 59, Vol. 73 of 25 November 1985 under Decree No. 26 entitled

- Constitution (Suspension and Modification) (Amendment) Decree, 1986. We note, however, that this amendment did not cover section 252 of the Constitution in which there is 'Islamic Personal Law'.
48. Unreported KDH/24/A/86 of December 1986.
 49. A Committee established by the Federal Military Government to review the 1979 Constitution has completed its assignment. It submitted a draft to the government and, at present, a Constituent Assembly is working on the draft.
 50. SCAL, 1963: s. 14
 51. *Muqallidun* is the plural of *Muqallid* meaning 'imitator'.
 52. *Mujtahid* is the singular of *Mujtahidun* meaning 'one who exerts himself in legal deduction and speculation'. Such a person must be versed in Islamic Studies, especially in the *Shari'ah* and must be of impeccable character.
 53. Burhan ad-Din Ibrahim b. 'Ali b. Farhun *Tabsirah al-Hukkam Fi 'Usul al-'Aqdiyyah Wa Manahij al-'Ahkam* in Volume I of Abu 'Abdullahi Muhammed Ahmad Ulaysh *Fath al-'Aliy al-Malik Fi al-Fatwa. 'Ala Madh-hab al-Imam Malik*. p. 24
 54. SCAL, 1963: s. 14 (a)
 55. Interview with Dr Hassan Ibrahim Gwarzo, Grand Kadi of Kano State on 24 February 1986 at Kano.
 56. Please see the Bibliography for full reference on each of the books used in this table and in Table XIV that follows.
 57. SCAL, 1963: s. 15 (1)
 58. Unreported FCA/K/69/85 of 2 June 1985. The case was decided by Justices D.O. Coker, Karibe Wyte, Abubakar Bashir Wali, Umaru Maidama and M. Nasir.
 59. Abdulmalik Bappa Mahmud, *op cit* pp.16-48.
 60. Unreported PLS/SCA/CV/104/85.
 61. *CFRN*, 1979: s. 244
 62. J.N.D. Anderson and N.J. Coulson, *Islamic Law in Contemporary Cultural Change*. Sonderdruck aus SAE CULUM XVIII Heft, 1-2. 1967.
 63. SCAL, 1963: s. 18
 64. *Ibid*: s. 19 (1)
 65. *Ibid*: s. 19 (3)
 66. *Ibid*: Order II (1)
 67. Interview with Alhaji Haliru Binji, Grand Kadi of Sokoto State on 4 April 1986 at Sokoto
 68. SCAL, 1963: Order IV (1)
 69. *Ibid*: Order II (3)
 70. *Ibid*: Order III (4)
 71. *Ibid*: Order III (5)

72. *Ibid*: Order III (2)
73. *Ibid*: Order IV (1)
74. *Ibid*: Order IV (3) (i)
75. *Ibid*: Order III (6)
76. *Ibid*: Order III (7) (v)
77. *Ibid*: Order VI (1)
78. *Ibid*: Order III (7) (i)-(iv)
79. *Ibid*: s.20 (1) – (3)
80. *Report of the Area Courts Reform Committee, 1976* Lagos: Federal Ministry of Information, 1976, p.38
81. *FGVRACRC, op cit* p.11
82. Unreported CA/K/80s/85 of 11 December, 1985
83. Justice Karumi Muhammad Kolo, Chief Judge of Borno State and Governor Ishaya Bakut of Benue State had the same contention on Nigerian lawyers. See ‘An Address to Legal Practitioners in Borno State’ by Justice Kolo (1986); and page 16 of *The Daily Times* of 28 February 1987 for the view of the two personalities respectively.
84. The extent of such representation has been explained earlier – as contained in SCAL, 1963: s.20 (1) – (3).
85. SCAL, 1963: Order VII (1) (i)
86. *Ibid*: Order VII (1) (iii)
87. *Ibid*: Order VII (1) (ii)
88. *Ibid*: Order VII (1) (iv)
89. *Ibid*: Order VII (1) (v)
90. *Ibid*: Order VII (2) (i)
91. *Ibid*: Order VII (2) (ii)
92. *Ibid*: Order VII (2) (iii)
93. Table XIV refers.
94. They include Justice Abdulmalik Bappa Mahmud – Grand Kadi of Bauchi State (on 28 February 1986) Justice Muazu Aliyu Grand Kadi of Kaduna State (on 18 February 1986), and Justice Haliru Binji of Sokoto State (on 9 April 1986).
95. Muhammad b. Ahmad Mayarah, *Sharh Tuhfah al-Hukkam*. Vol I NP. Dar al-Fikr, ND. p. 33.
96. Unreported PLS/SCA/CV/104/85 of 15 January 1985.
97. Interview with Justice Yahya Kanem, Grand Kadi of Benue/Plateau States on 27 February 1986 at Jos.
98. Interview with Justice Shayk Ahmad Lemu, Grand Kadi of Niger State on 4 April 1986 at Sokoto; and Justice Abdul-Kadir Orire, Grand Kadi of Kwara State on 3 March 1986 at Ilorin; and others.
99. SCAL, 1963: Order VIII (1) (i)
100. *Ibid*: Order VIII (1) (ii)
101. Interview with Justice Yahya Kanem in Jos on 27 February 1986

102. Interview with Justice Haliru Binji in Sokoto on 4/4/86
103. Muhammad b. Ahmad Mayarah, *op cit* p. 25
104. Interview with Mallam Garba Abubakar Madungurum, Principal Inspector of Area Courts, Kano on 25/2/86; and Alhaji Muhammadu Yusuf, Chief Inspector of Area Courts, Jos on 28/2/86.
105. Interview with Justice Abdul Kadir Orire in Ilorin on 22/3/86, Justice Hassan Gwarzo in Kano on 24/2/86, and Justice Shaykh Ahmed Lemu (of Niger State) in Sokoto on 8/4/86.
106. SCAL, 1963: Order VIII (2) (i)
107. *Ibid*: Order VIII (2) (ii)
108. *Ibid*: Order VIII (3)
109. *Ibid*: Order VIII (4)
110. *Ibid*: Order IX (4) (ii)
111. *Ibid*: Order V (1) and (2)
112. *Ibid*: Order III (9) and (10)
113. Interview with Justice Shaykh Abubakar Mahmoud Gumi, retired Grand Kadi of the old Northern Nigeria on 6 April 1986 in Kaduna.
114. Interview with Justice Shaykh Ahmed Lemu on 8/4/86.
115. Interview with Justice Bashir Sambo on 7/4/86
116. Interview with Justice Haliru Binji (on 4/4/86) and Muazu Aliyu (on 18/2/86).
117. Interview with Justice Abdulmalik Bappa Mahmud (on 28/2/86); and Bashir Sambo (on 7/4/86).
118. Interview with Justice Abdulkadir Orire (on 22/3/86) and Dr Hassan Gwarzo (on 24/2/86).
119. Interview with Justice Bashir Sambo on 7/4/86
120. Interview with Justice Shaykh Ahmed Lemu on 8/4/86
121. Interview with Justice Yahya Kanem on 27/2/86
122. Interview with Justice Bashir Sambo on 7/4/86
123. Interview with Justice Abdulkadir Orire on 22/3/86
124. Interview with Justice (Dr) Hassan Gwarzo (on 24/2/86) and Abdulmalik Bappa Mahmud (on 28/2/86)
125. Interview with Justice Abdulkadir Orire on 22/3/86
126. Interview with Justice Abdulmalik Bappa Mahmud on 28/2/86
127. Interview with Justice Haliru Binji on 4/4/86
128. Interview with Justice Shaykh Abubakar Mahmud Gumi on 6/4/86
129. *Ibid*.
130. Ahmad Amin, *Duha al-Islam*, Vol. II Cairo: Maktabah an-Nahdah al-Misriyyah, 1974, pp. 171 and 206.
131. Tanzil ar-Rahman, 'Application of *Shari'ah* in the Muslim

- World' in *The Muslim World League Journal* (MWL) Vol. XI No. 3 Rabi' I 1404/December 1983 p.24.
132. ʿAbbas Husui Muhammad, *al-Fiqh al-Islami Afaquhu Wa Tatawwuruhu*. Makkah al-Mukarramah: al-Amanah al-Amah Li Rabitah al-ʿAlam al-Islami, 1402 p.236
 133. Muhammad b. Ahmad Mayarah, *op cit* p. 26
 134. Ahmed Ibrahim Omer, ed. *Sharʿah Law Reports* Vol. 1 No. 1 Zaria: Centre for Islamic Legal Studies, Ahmadu Bello University, 1980 p. 18 (SLR, 1980: 18).
 135. *Ibid.* p.41.
 136. Salih ʿAbd as-Samiʿ al-Abi al-Azhari *Jawahir al-Iklil* Vol. I Beirut: Dar al-Fikr ND p.364.
 137. SLR, 1980 p. 27
 138. 2nd paragraph of section 2.4.3 of this work refers.
 139. The entire section 2.4.3 of this work refers.
 140. CFRN, 1979: s. 217 (2) (b)
 141. Justice Abubakar Bashir Wali was appointed Justice of the Supreme Court towards the end of 1987.
 142. CFRN, 1979: s. 226
 143. *Ibid.* s. 218 (1) and (2)
 144. *Ibid.* s. 218.
 145. The last paragraph of section 2.4.3 of this work.
 146. CFRN, 1979: s. 219
 147. *Ibid.* s. 223 (1)
 148. They are contained in the official Gazette of the Federal Republic of Nigeria, No. 31, Vol. 68 of 29 June 1981 – as a Supplement to the Gazette i.e. Government Notice No. 534 entitled '(Federal) Court of Appeal Rules 1981'.
 149. *Federal Court of Appeal Act, 1976 and Federal Court of Appeal Rules, 1981 (with Amendments up to July 1982)* Bauchi: Galz Press Limited, 13 Dass Close, P.O. Box 109 (Part II: s.16).
 150. CFRN, 1979: s. 223 (2) (a)
 151. Federal Court of Appeal Rules, (FCAR), 1981: Order 1(20) (iii).
 152. *Ibid.* Order 3 (25) (i) and (ii)
 153. *Ibid.* Order 3 (26)
 154. Unreported FCA/K/41s/83 of 7 December 1983.
 155. Unreported FCA/K/30s/83 of 8 December 1983.
 156. Unreported FCA/K/31s/83 of 9 December 1983.
 157. Mohammad b. Ahmad Mayarah, *op cit* p.192
 158. Unreported FCA/K/14s/83 of 7 December 1983.
 159. Table XII containing statistics of cases according to subject matters attests to this submission.
 160. Section 4.2.1 of this work refers.
 161. Unreported FCA/K/36s/81 of 19 April 1982.

162. Unreported FCA/K/126s/82 of 16 March 1983.
163. CFRN, 1979: s. 258 (1)
164. Unreported FCA/K/69/85 of 2 June 1983.
165. Cap. 49 of NN Laws, 1963
166. Section 4.2.3 of this work refers (Par.2)
167. Unreported CA/3/165/84 of 3 January 1985.
168. Unreported K/56A/79 of December 1979.
169. CFRN, 1979: s. 242 (e)
170. Unreported CA/80s/85
171. On page 14 of the Proceedings
172. 7 S.C. 124
173. CFRN, 1979: s. 215
174. *Ibid.* s. 211 (1)
175. *Ibid.* s. 211 (3)
176. *Ibid.* s. 214
177. *Ibid.* s. 252
178. *Ibid.* s. 252 (2) (a) (i) and (ii)
179. *Ibid.* s. 212 (1) and (2)
180. *Ibid.* s. 213 (1)
181. Unreported FCA/K/30s/83 of 8 December 1983.
182. Unreported FCA/K/31s/83 of 9 December 1983.
183. Interview with Alhaji Hayatu Sirajo, Senior Registrar (Litigations), (Federal) Court of Appeal, Kaduna, on 24 June 1988.
184. CFRN, 1979: s. 213 (b).

CHAPTER FIVE

Problems and Prospects of *Shari'ah* Legal Practice in Nigerian Courts

Having discussed the organisational structure and the *modus operandi* of Nigerian courts of *Shari'ah* jurisdiction in the preceding chapters, attempt is made here to highlight the problems and prospects of *Shari'ah* legal practice in the country. The survey is made under five major divisions. The first section discusses the desirability or otherwise of applying *Shari'ah* law as either 'native law and custom' or 'customary law', while the second examines the position of the organisational structure of the Nigerian courts of *Shari'ah* jurisdiction. The plight and scope of *Shari'ah* law in Nigerian courts are the subject of the third section, while a survey of how *Shari'ah* personnel are provided for the courts is contained in the fourth. The last division discusses the social set-up of the judiciary in contemporary Nigeria with a view to determining the effectiveness or otherwise of the English legal system which has been superimposed on other laws in the country, including *Shari'ah* legal system which appears to us to be more effective in curbing the rate of crime in the society.

5.1 *Shari'ah* Law as Native Law and Custom or Customary Law

In view of the fact that *Shari'ah* law is being applied as part of native law and custom, and whereas the Muslim were, as they still are, consistent in demanding for the application of *Shari'ah* law *per se* on any Islamic matter affecting them in any Nigerian court, we discuss below the various adducible grounds for the desirability or otherwise of applying *Shari'ah* law as merely traditional law of the natives of Nigeria – North and South.

5.1.1 The Place of 'Urf' Customary Law' in the Development of *Shari'ah* Legal System

Sources of *Shari'ah* legal system are principally two: the Qur'an and the *Sunnah*. Both sources developed during the era of the Prophet Muhammad (SAW). As Qur'anic injunctions were coming to the Prophet through revelation, he was simultaneously practising, interpreting, and teaching them to the 'Ummah'; thus the Qur'anic revelation and the prophetic *Sunnah*

became the primary sources of the *Shari'ah*. It is on record that the Prophet sent some of his able Companions (*as-Sahabah*) to the Provinces as emissaries,¹ particularly Mu'adh b. Jabal (who was sent to Yemen) for the purpose of teaching converts the tenets of their new religion. In a dialogue between the Prophet and Mu'adh when the former was bidding the latter a farewell to his new station, *al-Ijtihad bi ar-Ra'y* was formally approved as auxiliary to the two primary sources of the *Shari'ah*.²

After the demise of the Prophet, each of the four Orthodox Caliphs applied the sources of the *Shari'ah* in deciding cases between members of the Muslim 'Ummah'. However, *al-Ijtihad bi ar-Ra'y* began to expand with time. It developed to what came to be known later as *Ijma'* (consensus of opinion); for, each Caliph used to summon leading Companions of his reign to give legal opinion (*fatwa*) on any thorny legal issue before him.³

With the spread of early Muslims to the Provinces outside Arabia, Islam came in contact with divergent cultural groups. The few Muslims in each Province were confronted with the problem of interpreting one Qur'anic injunction or another. The learned among them organised schools where the Qur'an and the *Sunnah* were taught; and on such teachers fell the onus of interpreting the *Shari'ah*. Within the first century of Islam, many schools of thought had emerged in the Provinces and in Arabia, each interpreting the custom of the people of the locality in line with the primary sources of the *Shari'ah*.⁴ During the period, *al-Ijtihad bi ar-Ra'y* developed to *Qiyas* (analogical deduction).

Guidelines were set up during the process of interpretation. Whatever culture found to be in conformity with the teachings of Allah in the Qur'an were declared lawful (*halal*) but the contrary unlawful (*haram*). Similarly, the culture found to be contrary to the practice of the Prophet but which might not necessarily be unlawful were regarded detestable (*makruh*) while the exact practices of the Prophet which were not derived directly from the Qur'an were labelled supererogatory (*mustahabb*). Some other practices which were neither lawful nor unlawful and neither supererogatory nor detestable were termed permissible (*mubah*). With these yardsticks, the culture of any nation could be measured with regard to its legality or otherwise under the *Shari'ah*.

Before the end of the third century of Islam, many of the existing schools of thought had become extinct due to some remote reasons, giving way for a few extant ones among which were, principally, the prominent four *Sunni* schools and a few others in the *Shi'i* line. *'Urf* became incorporated in the

subsidiary sources of *Shari'ah* legal system through the 'permissible' acts of the people. The major areas in which *'Urf* can play a significant role under the *Shari'ah* legal system include determination of age of puberty and period of menstruation which are subject to either geographical/biological circumstances or individual peculiar experience.⁵

The inclusion of *'Urf* among the sources of the *Shari'ah* has contributed immensely to the flexibility of Islamic law. Through it, doctors of law were having the opportunity of re-interpreting the two primary sources in the light of people's civilisation at different ages and in different localities. For instance, some earlier judgements of Imam ash-Shafi'i were reported to have seemingly contracted his later judicial decisions in some respects due to different social factors at different times;⁶ and references were made to the statements of Ibn al-Qayyim, al-Qarafi, and Ibn 'Abidin in their respective works on the validity of change in judgement due to either difference in geographical location or level of civilisation at different periods.⁷

It is clear from the foregoing that *'Urf* is among the sources of *Shari'ah* law though (not all the *'Urf* but) only part of it which may conform with either the Qur'anic injunctions or the prophetic *Sunnah*, or that which is indifferent to both but not in opposition to either. In addition, it is worthy to note that *'Urf* is just a branch of the subsidiary sources of the *Shari'ah* and not a primary source. However, the role *'Urf* can play or, in other words, the scope of *'Urf* as a source of the *Shari'ah* is small though important. In summary, positive custom (*'Urf*) is acceptable as part of *Shari'ah*.

5.1.2 Origin of Native Law and Custom and Customary Law in Nigeria

The nomenclature of either 'native law and custom' or 'customary law' has colonial orientation.⁸ The British administrators and judicial officers were merely searching for words which would differentiate their *esoteric* religious and *exoteric* political laws from the traditional laws of the territories they colonised. As the Muslims ruled the newly converted territories to Islam with *Shari'ah*, the British ruled the conquered lands with the Christian oriented English law. The introduction of both the Islamic and the English laws to Nigeria has thereby reduced the indigenous customary law of the country to the third position.⁹ It can be observed that some indigenous customary laws were often easy to conquer due to their personal and particularistic nature to the ethnic group of a territory. According to Justice A.P. Anyebe, the British

as conquerors, jealous of their victory...were not in a mood even to negotiate on the law applicable between Nigerians, *inter se*, and between Nigerians and other nationals. Her Majesty, the British Monarch, therefore decreed straightaway that the fundamental law applicable in Nigeria was to be the British customary law.¹⁰

The British government was, however, tactical and diplomatic in its approach so as not to appear to the world that its administrators were dictators. Tacit concession was given to people of the colonised territories to apply their respective traditional laws. Yet a number of checks and balances were provided to prevent the traditional system of law from dominating the newly imposed English law. Such include limitation in the jurisdiction *ex personae*, territorial jurisdiction, and law of application in the native traditional courts.¹¹

The judicial officers of the British and their administrators did not hide their contempt for African traditional laws. In *Eshugbayi v. Nigerian Government* (1931),¹² their Lordships of the Privy Council viewed African traditional laws as primitive and barbarous.¹³ Similarly, Honourable Joseph Chamberlain, who was the Secretary of State for the Colonies, said on the floor of the British House of Commons on 22 July 1904:

We hold our position (overseas) by being the dominant race and, if we admit equality with the inferior race, we shall lose the power which gives us predominance.¹⁴

Thus, several conferences were held in search of a uniform term to describe the different aspects of the applicable traditional laws in Africa. The conferences considered quite a number of terms like 'native law', 'local law', 'tribal law', 'traditional law', 'African law', 'customary law' and a host of others; yet there was no consensus on a single term for adoption.¹⁵ Different countries thereby adopted divergent terms that suited them. For example, Ghana adopted 'Customary law' and had cause to define it; as Uganda applied 'civil customary law' with its peculiar definition.¹⁶ Native law and custom was adopted for Northern parts of Nigeria and customary law for the Southern parts.

Major problems of the British in this regard include the prevalence of Islamic law in the conquered territories of Africa and the government's bid to include the *Shari'ah* among the native customary laws. Had they accepted the law of each locality on its own merit and accorded it its status, perhaps there would not have been such problems of nomenclature for the laws. However, as the search for a single nomenclature continued, the courts were making some negative rulings on

the issue. For example, in *Khamis v. Ahmed* (1934),¹⁷ the Court of Appeal for Eastern Africa ruled that the law of Islam could not be described as 'native law'.¹⁸ Records are equally available on the inconsistency of British administrators – including Lord Lugard – in their understanding of 'native law and custom' which was eventually applied in Northern Nigeria.¹⁹ These developments confused the courts in Nigeria in developing a general theory on how the native rules could be tested as discussed below.²⁰

Many writers adduced no reason for, and could not justify, the inclusion of Islamic Law in the 'native law and custom'. They merely mentioned in their works that the British counted it as one of the native laws,²¹ but Anderson attempted to justify the inclusion.²² In his remarks, 'the Maliki law has to a great extent become fused with the customary law of many of the inhabitants of these Emirates'. He thereafter classified Islamic Law – as applied in African territories – into three categories:

- i. where it has become the fundamental law, e.g. Zanzibar (now part of Tanzania);
- ii. where it has become the dominant law as in Tanganyika (now part of Tanzania); and
- iii. where it was and is still a particular law as in the Gold Coast (now Ghana).²²

The three classifications are available in Nigeria. For instance, it is the fundamental law in places like Sokoto and Kano States, the dominant law in Kwara and Niger States, and a particular law in Edo, Lagos and Oyo States where its application is not yet allowed statutorily. More light is shed on the topic in the following examination of how the law is applied in Nigeria.

5.1.3 Application of Native Law and Custom in the Northern, and Customary Law in the Southern States of Nigeria

The application of native law and custom has been extensively treated in Chapter Three, yet some problems associated with it which also confront the application of customary law in the Southern States of Nigeria need to be highlighted further. In the first instance, more often than not, judges were confronted with choice of law from the list of what constitutes 'native law and custom'. The law is basically territorial, yet it allowed the application of the law 'binding between the parties'.²⁴ An example can be given of *Obi Osuagwu v. Dominic Soldier* (1959)²⁵ in which the trial *Alkali* Court in Kaduna administered Islamic law as the prevailing territorial law but was quashed at the superior court by Brown, C.J. with the following remarks:

where the law of the court is the law prevailing in the area but a different law binds the parties, as where two Ibos appear as parties, in the Moslem court in an area where Moslem law prevails, the native court will – in the interests of justice – be reluctant to administer the law prevailing in the area, and if it tries the case at all, it will – in the interests of justice – choose to administer the law which is binding between the parties.

The view of Justice Brown would not be accepted by the *Alkalai* of Native Courts who, according to the observation of Professor Anderson,²⁷ regarded the application of Islamic Law as binding on them ‘by divine command’ whereas, the British administrators and lawyers who permitted its enforcement (including Justice Brown) regarded it as merely a native law and custom. Hence, the *alkali* would prefer to enforce the precise prescription of Islamic law as contained in the legal manuals on any case before him, even when that ran counter to an ordinance and regardless of what law might be binding between the parties.²⁸ These basic opposing stands had been causing nullification of cases decided by Islamic court judges in the English oriented superior courts and it will continue to be so unless and until a solution is provided. As the *Alkalai* would not yield to a compromise, the British (trained) lawyers would not divorce themselves from the belief that Islamic law should be among the native law and custom.²⁹ *Sulia Ayoola and others.v. Murtala Folawiyo*³⁰ which involved the Will of a deceased Muslim is an example of an old case in which the court argued that whether it was called ‘Muhammadan Law or Custom’, ‘Muhammadan Customary Law’, or ‘Muhammadan lawful custom’, it was still the same customary law of the Muslims which should be counted among what constitute ‘native law and custom’.³¹

The interest of the British administrators and lawyers – as being repeatedly noted in this work – was only in making a distinction between the imported English law and all other laws prevailing in the colonised territory; hence certain qualifications were provided for such latter laws before application; for instance they:

- i. should be applicable only to peoples indigenous to the locality where such laws hold sway;
- ii. must be existing laws and not merely customs of ancient times.
- iii. must not be contrary to public policy;
- iv. must not be incompatible either directly or by necessary implication with any written law; and
- v. must not be repugnant to natural justice, equity and good conscience.³¹

It would be expected that after the independence in 1960 and with some Nigerians heading their country's judiciary, solutions would be provided for the contempt of the laws met in Nigeria by the English law. The contrary was the result, as Justice Anyebe revealed:

Many of these lawyers of eminence, particularly quite a number at the apex of the judicial ladder, have been nurtured in their ways and thoughts from England. There they willy-nilly succumbed to the wily indoctrination that nothing good can come out of Africa (sic). They are more conservative therefore than the English Lord Denning, MR in their belief in the sanctity and inviolability of the English way of life. And their piercing judicial sword is ready to strike down any...law that is likely to outrage the English notions of natural justice, equity, and good conscience...and therefore the only way to develop its (Nigerian) law is to tailor it to English standards.³³

Both the Nigerian lawyers of eminence and their British mentors argued confidently that any other law besides the English law was a matter of evidence and not of law as if others were not laws. Examples of that stand include the submission of Verity, CJ, in *Adedibu v. Adewoyin*³⁴ and section 73 (1) of the Evidence Law.³⁵

It is absurd to note that English Courts were unable to understand fully the repugnancy clause of 'natural justice, equity and good conscience' with which they measured, and with which their trained lawyers still measure, the validity of all other laws. As one would expect that the three segments of the clause: natural justice', 'equity' and 'good conscience' could be understood separately according to what each connotes, it was decided in *Lewis v. Bankole* (1908)³⁶ that all the three should be taken together and no attempt should be made to split them up; for, they collectively have a single meaning. Different judges have since then been applying it to quash cases on appeal from lower courts, particularly those decided with the native law and custom. An additional case for illustration is *Guri v. Hadejia N.A.* (1959)³⁷ in which the law applied by the lower court was rejected 'because it denies (sic) to a person accused of highway robbery the right to defend himself'.³⁸ The vagueness of that repugnancy clause has been advantageous to the eminent lawyers and jurists of English orientation and instead of the indigenes among them to promote the traditional laws of their land, they continued to undermine them through various methods as discussed in the previous chapters. Justice Anyebe has also observed very correctly that:

...people painstakingly trained in the English law or the common law and its ethics clearly mapped out by centuries of history and practice have had suddenly thrust upon them the administration of law of a people they consider barbaric and primitive beyond redemption.³⁹

The inconsistency of the eminent lawyers and jurists, particularly the administrators among them, can be seen further in the recent practice of establishing Customary Court of Appeal. For example, in spite of the fact that a *Shari'ah* Court of Appeal is serving Benue and Plateau States, a Customary Court of Appeal was established by the government of Plateau State in 1980, an indication that the *Shari'ah* law of the former court is different and distinct from the native law and custom of the latter court. According to Justice Yusufu Yakubu of the Customary Court of Appeal, Jos,⁴⁰ most of the cases handled by his court were on inheritance of farmland among the indigenous people of the state. The issue at stake from the foregoing is that Islamic law should not be counted among the constituents of native law and custom, and the establishment of the Customary Court of Appeal in Jos may be said to be in order. Finally, in this regard, P.U. Umoh has equally noticed the Nigerian judicial administrators' contempt for courts other than English oriented courts in the country. He maintained that it is absurd to subject the decisions of courts other than English oriented courts to English courts on Appeal; for both the former and the latter are equal in status.⁴¹

The place of *Shari'ah* law as applied in the courts of Northern States of Nigeria – being regarded as native law and custom – is better than its place in the courts of Southern Nigeria where it has never been regarded a part of the applicable customary law. A critical digest of traditional system of justice dispensation in the area, particularly the Western part, suggest that Islamic law could be desirably applied under the cloak of Customary law. Disputes were, prior to Independence, settled by the elders of a family, a tradition which is still extant. An aggrieved person with the decisions of the family head could appeal to the head of the community in the ward. If still aggrieved with the latter's decision, the case could go to the local chief in the town and thence to the paramount ruler of the community for final settlement. Undoubtedly, where Muslims were heads of the compound, the ward, the town, or the paramount ruler, their judicial decisions would be sympathetic with the principles of *Shari'ah* law if they were versed in such and if their warring subjects (litigants) were also Muslims. Once a person embraces Islam, his law *ipso facto* becomes the *Shari'ah*,

though part of his old customary law which are not repugnant to Islamic law may be retained as earlier explained.

Customary Courts were established for the people of Southern Nigeria and attempts were made after the first quarter of the twentieth century to codify the Customary Laws. For instance, consequent upon the conference of Yoruba chiefs in 1937,⁴² many reforms were made on the Yoruba Customary Laws, particularly on matrimonial issues. The various laws of the defunct Western Region prior to Independence were modelled upon such reforms.⁴³ The organisational structure of such courts were initially vested in the Minister of Justice of the Western Region and the Local Government Service Board,⁴⁴ but in 1972 such powers were transferred to the Chief Judges of the States by the Customary Courts (Amendment) Edict, 1972, sections 3 and 11. Following the arguments in the above paragraph, it will be expected that people in whom the powers were vested on the organisational structure of the courts would recognise the tradition of their people in establishing customary courts; but the contrary prevailed.

The situation did not change much with time. Amendments were made *mutatis mutandis* in the existing Customary Laws while States whose customary courts had earlier been abolished had them resuscitated. Oyo State Customary Courts Law of 1980 which came into effect on 11 February 1981 recognised only three grades of the Court (A, B and C) as against the previous four, established in Second Schedule B(1) of W.R.L.N. Cap. 31; yet no person learned in Islamic law was appointed a Judge. In areas where Muslims were in majority, the composition of Customary Courts often reflected that; such as Ikirun where four Muslims and a non-Muslim or Ila-Orangun where two Muslims and a non-Muslim were members of a Customary Court each as at 1985,⁴⁵ yet no effort was made to train them in Islamic Law.

In Lagos State, Customary Courts Law is contained in Chapter 33 of the 1973 Laws of the State. The Courts have both civil and criminal jurisdiction.⁴⁶ The laws share similar features with their Oyo State counterparts in many respects. Courts' personnel and their qualifications are contained in section 4 of the chapter while appeals lie from the Customary Courts in the Magistrates' Courts as practised in Oyo State. All these reveal the modelling of Customary Courts on the English pattern.

In 1975, there were 428 Customary Courts, 24 Magistrates' Courts and 17 High Courts in Oyo State,⁴⁷ yet none was applying the *Shari'ah*, whereas Muslims are in majority in fifteen of the

twenty-four local government areas of the state.⁴⁸ This reveals the necessity for the application of the *Shari'ah* in the courts of the State even if partially as in the Northern States. An examination of the law of administration in the Customary Courts of Oyo State as well as their jurisdiction and procedure also suggests a partial approval of Islamic law if the judges were learned in it. This is so because a customary court could apply:

- a. the appropriate customary law specified in section 20 in so far as it is not repugnant to natural justice, equity, and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force;
- b. the provisions of any written law which the court may be authorised by an order made under sections 24; 119;
- c. the provisions of any enactment in respect of which jurisdiction is conferred on the court by that enactment.
- d. the provisions of all rules and bye-laws made by a local government council, or having effect as if so made, under the provisions of any enactment and in force in the area of jurisdiction of the court.⁴⁹

Furthermore, the judge is given the freedom to apply any customary law of his choice except that the 'welfare of the child shall be the first and paramount consideration', i.e. where the case is related to the guardianship of children.⁵⁰

As regard jurisdiction, there is not much difference from that of the native courts of the Northern States treated in Chapter Three of this work. The procedural law was made prior to 1971 by the Minister of Justice and thereafter by the State Chief Judge; it thereby trails the Western (English) system in most cases. It can be deduced herefrom that if the Muslim judges of the Customary Courts were trained in the Islamic law system, it would have been easy for them to apply the *Shari'ah* as part of the Customary Law just as their counterparts in the North applied and still apply such under the cloak of native law and custom. Moreover, if the local governments in which Muslims were in majority could enact bye-laws with Islamic bias, application of Islamic law in the courts would have been formally legalised.

According to the notion that military rules are corrective regimes, Customary Courts Reform Committee was set up in 1976 as earlier discussed. However, the most unfortunate recommendation of the Committee's Report is item 33 which states:

No case has been made for the establishment of Muslim Courts in areas where there are Muslims in the Southern parts of Nigeria.

The then Federal Military Government accepted this recommendation without reservation in its White Paper on the Committee's Report.⁵¹ If the committee had recommended that Muslim Courts should not be established in areas where there were non-Muslims, it would have been logical, but that such should not be established 'in areas where there are Muslims' is absurd, while the acceptance of such recommendation by the government, despite the well documented requests of the Muslims for the establishment of *Shari'ah* Courts (as presented in Chapter Two), is dangerous. The consequence of that administrative error by which the Muslims were not given the right of applying the *Shari'ah* in the courts is the resurgent demands for it in the South and the tension it has generated. Indeed, several Muslim Youth Organisations are vehement in their demands for the application of the *Shari'ah* in the Southern States. An example is Council of Muslim Youth of Ogun State which submitted a formal request for such to Governor Oladipo Diya before he was reposted out of the State.⁵² Muslim Community of Oyo State and the National Committee on the *Shari'ah* have also been preparing series of memoranda for submission to the Federal Military Government on the issue.⁵³

It can be understood from the foregoing that Islamic law can never be accepted by the Muslims to be merged with customary law. This shows the civilisation of the Muslims and their understanding of their religion and what it stands for. In spite of the several loopholes contained in the Report of the 1976 Customary Courts Reform Committee (other than item 33), the Muslim Customary Court judges of the Southern States have not been able to apply the *Shari'ah* law in their courts. Even in Bendel State where the Customary Courts Edict (No. 9), 1978, was promulgated to implement a recommendation of the Reform Committee that non-legal practitioners should be appointed judges of the Customary Courts,⁵⁴ cases of Islamic interest continue to suffer (even in the hands of Muslim judges) simply because they are not trained or learned in Islamic law. In *Nana Fatimatu v. Mallam Musa* (1984),⁵⁵ the couple was separated on a flimsy ground that one of the contracting parties was no longer interested in the marriage.⁵⁶ It was a *Khul'* case in *Shari'ah* terminology, i.e. marriage dissolution initiated by the wife.

Similarly, the marriage between Chief Alasan Momoh and Mrs Aishetu Momoh was dissolved at the Agbede Customary

Court on the ground of 'no child after marriage for several years'. The case, '*Chief Alasan Momoh v. Mrs Aishetu Momoh* (1985)⁵⁷ however went beyond divorce. It also touched on the law of paternity; for, the woman gave birth to a child on 5/3/80, whereas she absconded from the home of Chief Momoh in August 1981. She alleged that the child belonged to her new husband while Chief Momoh was claiming the paternity of the same baby.⁵⁸ The new husband also claimed paternity of the baby; hence both Aishetu and the new husband have indirectly confessed committing adultery. Abu submitted that according to the customary law, the adulterer would only be requested to pay a meagre amount and take the paternity and custody of the baby in dispute.⁵⁹ The contrary would have happened under Islamic law; for, 'the baby belongs to the bed' – Chief Momoh in this case as earlier discussed.⁶⁰

Several similar cases have been treated in other States of the South. Lagos and Oyo States are sampled as follows:

- i. In *Nafiu Rufai v. Oluyemisi Kokumo* (1978),⁶¹ a Lagos State Customary Court dissolved the marriage 'on the grounds that love could not be forced'. It was a *Khut* case in which the husband was reported to have lost one of his legs in a motor accident. The wife only gave the usual cause of 'no more love' to divorce the husband. Such excuse is not sufficient for granting divorce in Islamic law, the legal injury (*darar*) she would suffer with the retention of the marriage must be adequately proved.⁶²
- ii. In *Risikatu Saka v. Mukaila Olukoga* (1985),⁶³ an Ikorodu Customary Court granted divorce on the grounds that the wife had not had a child, and the husband's failure to organise a marriage ceremony.
- iii. In *Sifawu Anike v. Tijani Amoo* (1965),⁶⁴ Ikirun Grade CI Customary Court of Oyo State granted divorce to the wife on a mere ground of 'no love'.⁶⁵
- iv. In *Muyideen Lamidi v. Sinatu Muyideen and Raimi Oshikoya* (1985), an Ikorodu Customary Court awarded ₦ 400 cost to Lamidi as against his request of ₦500 from the defendants on the ground of committing adultery. In this case, Sinatu claimed that her last two children in the matrimonial home of Muyideen Lamidi belonged to Raimi Oshikoya. Muyideen then sued for adultery. This case is similar to that of *Chief Alasan Momoh v. Mrs. Aishetu Momoh* (1985) of Agbede in Bendel State, earlier treated

Both *Muyideen Lamidi v. Sinatu Muyideen and Raimi Oshikoya* and *Chief Alasan Momoh v. Mrs Aishetu Momoh* can be compared to a similar case decided by an Ilorin Area Court on the principle

of *Shari'ah*: In *Saka Ajadi v. Taye Alabi* (1979),⁶⁷ a woman was forced to bed by the defendant before she was given in marriage to the plaintiff who also cohabited with her in the same month. She became pregnant and the defendant went to the plaintiff's house, summoning the woman to a Welfare Office for settlement. The plaintiff instituted a court action against the defendant. The woman testified that the two contestants had sexual intercourse with her in the same month but the contribution of the plaintiff was greater than that of the defendant. She added that the defendant's act with her was illegal for she was more or less forced. The trial judge awarded the pregnancy to 'the bed', i.e. the legal husband of the woman.⁶⁸

- v. In *Alhaja Salawa Abeni v. Alhaji Lateef Adepoju* (1984),⁶⁹ divorce was granted to the plaintiff with no proof of legal cruelty under Islamic law but on the grounds of commercial transaction.

A similar case was decided in Oyo State:

Muniratu Abejo v. Jimoh Amoo (1974).⁷⁰ The ground of divorce was 'lack of proper care and no money for trade'.⁷¹

In a few cases, decisions of Customary Court judges coincidentally agreed with the *Shari'ah* principle of law. Examples of such are as follows:

- i. *Alhaja Kulumbu Nafiu v. Alhaji Nafiu* (1979)⁷² where the wife sought *Khul'* on the grounds of lack of proper care because the husband had ten wives. She was granted the divorce on the grounds of lack of proper care, though, without adequate investigation. If it were to be in a *Shari'ah* Court, the same divorce would have been granted but principally and primarily if she was the fifth, sixth, seventh, eighth, ninth or tenth wife; for a Muslim should not marry more than four wives at a time⁷³, or if the lack of proper care could be adequately proved.⁷⁴
- ii. *Ramota Akanji v. Akanji Salawu* (1984)⁷⁵ in which the plaintiff sought divorce because her father did not bless the marriage. The divorce was eventually granted simply because she requested for it. If it were to be under Islamic law, the same divorce would have been granted but for many reasons among which are:
 - a. non-equality⁷⁶ (*Kafa'ah*); because the man is a cripple and this is the exact cause why the father refused to bless the marriage; and
 - b. a marriage without a *Wali* (marriage guardian) is null and void, whereas the father is alive, no other

person can stand as a lady's guardian in marriage unless with his authority.⁷⁷ Thus, since this marriage was without a *Wali*, it was a dissolution of a marriage which ought not to have taken place under the *Shari'ah*.

Finally, as the native law and custom cannot be accepted by the Muslims in Northern Nigeria to cover the *Shari'ah*, Customary law may not be accepted by the Muslims in the Southern States of the country in lieu of *Shari'ah* law; hence the agitation for the establishment of *Shari'ah* Courts *per se* all over the country. Our recommendations in this regard are contained in the next chapter after exhausting all facets of argument on the topic with the available materials at our disposal. Meanwhile, we consider below the definitions of some notable key words employed to convey the *Shari'ah* principles along with the indigenous African culture.

5.1.4 Definition of Some Key Words in the Terms Conveying the Application of *Shari'ah* Law with Indigenous African Customary Laws

Justice A.P. Anyebe has observed that lawyers seldom define law, and where they do, students are often confused; for they (lawyers) 'partitioned themselves into various cubicles called schools'.⁷⁸ His view had been vindicated by the definition of law given by Glanville Williams in his *Learning the Law*. Rather than giving a detailed definition of law, Williams merely stated that 'Law is the cement of society and also an essential medium of change'.⁷⁹ He concentrated on the constituents of law rather than its definition. However, legal anthropologists have done the definition of law for the lawyers and Beita Yusuf has done justice to this topic.

In examining the views of both old and modern anthropologists on the topic, he quoted Malinowski as conceiving law as indistinguishable from obligations and social relationships⁸⁰, while Radcliffe-Brown and Hoebel understood sanctions and norms as being legal when they are imposed by a constituted authority. He also digested the views of later anthropologists like Bohannan who considered law 'to be a doubly institutionalised phenomenon, a body of binding obligations which have been re-institutionalised within the legal system; and Pospisil who maintained that law is 'rules or modes of conduct made obligatory by some sanction which is imposed by a controlling authority'.⁸¹ Beita Yusuf had earlier defined law as 'a body of rules considered to be binding on community members, and the violation of which calls for specific negative sanctions from

a constituted authority.⁸² To him, law is a universal phenomenon which both reflects and influences social life. Starting from where Beita Yusuf stopped, we see law as a body of rules binding on all members of the society or a section thereof, for the purpose of regulating their mundane affairs in order that there may be peace and progress in the domain in particular and in the entire universe in general.

Next is the Customary Law which is difficult both to define and apply. Osborn, CJ once commented on the difficulty in applying native customary law; for 'it is unwritten...'⁸³ Hence, different people viewed customary law from different perspectives viz:

- i. According to section 2 of Chapter 61 of the 1963 Revised Edition of Eastern Nigeria Law, customary law is a local custom or rule which is applicable only in a particular district or among the members of a tribe or clan.⁸⁴
- ii. According to Anyebe, 'Law, customary or otherwise, is an expression of the ideals and aspirations of given people'.⁸⁵
- iii. Anyebe also quoted Salacuse as defining native law and custom as 'mirror of accepted usage, a reflection of the social attitude and habits of various ethnic groups' which 'derives its validity from the consent of the community which it governs...'⁸⁶
- iv. Ezeiofor observes that 'the customary law of a community is a body of customs and traditions which regulate the various kinds of relationships between members of the community in their traditional setting'.⁸⁷
- v. Anderson reports that the Privy Council as well as Gold Coast (now Ghana) Native Courts (Colony) Ordinance, 1944 had defined native customary law 'as simply established native usage'.⁸⁸
- vi. Summarising the materials available to him on the topic, Beita Yusuf writes: 'From the above definitions, one may deduce that 'Customary Law' refers to any body of African law which is largely uncodified and unwritten, and is overtly distinct from either General or Islamic law...'⁸⁹

Ezeiofor observes that customary law derives its strength from its acceptance by members of the community as obligatory on themselves⁹⁰ while Anyebe sees law generally as a 'spontaneous generation from the needs and aspirations of man in community'.⁹¹ He argues that though its specific details differ from time to time and from place to place, its most basic principles are uniform because human nature in its essence

is constant. However, Beita Yusuf was convinced that customary law 'is directly associated with a specific 'community', 'chiefdom', 'particular district', 'tribe', 'clan', or 'class of persons'⁹² while Ezejiofor confessed that even within a tribe, there are many customary laws.⁹³

We can deduce from the foregoing that customary law may be written or unwritten, codified or not codified, and varies from place to place and from time to time. The term 'customary' seems to be of a wider application than many other terms akin to it, hence we examine the dictionary meanings of 'Custom', 'Indigenous', 'Law', 'Native', and 'Tradition', in order to aid us to an appropriate conclusion on the topic. According to *Chambers 20th Century Dictionary*, ed. by. E.M. Kirpatrick, 1983 edition.

- i. 'Custom' is, among a variety of meanings, 'any of the distinctive practices and conventions of a people or locality, especially those of a primitive tribe (applied, *hist.* to a periodical massacre) in parts of West Africa'.⁹⁴
- ii. 'Indigenous' means 'native born; or originating or produced naturally in a country – opposite to exotic',⁹⁵
- iii. 'Law' is, among a variety of meanings, 'a rule of action established by authority', 'the rules of a community or state', 'established usage', 'a theoretical principle deduced from practice or observation', 'a statement or formula expressing the constant order of certain phenomena'.⁹⁶
- iv. 'Native' is, among many others, 'belonging naturally', 'belonging by birth', 'belonging to the people originally or at the time of discovery inhabiting the country, especially when they are not yet fully civilised.' etc.⁹⁷ and
- v. 'Tradition is 'a handing over (law; oral transmission from generation to generation, especially (often with cap.) of certain Christian, Judaic, and Islamic doctrines and customs'; 'a long established belief or custom'; 'anything bound up with or continuing in the life of a family, community, etc'.⁹⁸

5.1.5 Conclusion

The meaning of 'native law and custom' as well as 'customary law', and some synonyms of each word in the two terms reveal the primitive or barbaric connotation of African traditional laws which in turn reveals the contempt of the British judicial officers and administrators for such laws. They thereby searched relentlessly for a term which would distinguish their 'civilised' English law from such 'primitive and barbaric' laws. They equally left no stone unturned to whittle down the status

of all other laws beside the English law. We opine that 'traditional' is more appropriate than all others (including customary) to describe the laws operating in the conquered territories by the British. In meaning and usage, the word 'traditional' fits not only the 'customary laws' of the indigenous African people but also the introduced 'law of Islam'. The term is all-embracing, hence its usage in this work.

That notwithstanding, the inclusion of the *Shari'ah* in the applicable native law and custom – at least in Northern States of Nigeria – was an omission on the part of the British who relied solely on the meaning and usage of *al-ʿUrf* (as a source of the *Shari'ah*). We have demonstrated above, the limitations of *al-ʿUrf* and our conclusion therefrom can be corroborated by Professor Anderson who submitted as follows when defining *ʿUrf*:

This is not a formal source of law under the *Shari'ah*, although in reality a great part of the latter is derived therefrom. In theory, *ʿUrf* must always give way to a *nass* or text; but in practice local customs often survive and are applied by the courts...⁹⁹

Further to that, a comparison of the indigenous laws of Nigeria to *Shari'ah* law reveals some areas of agreement and disagreement, hence the validity of the traditional yardstick to measure people's custom as presented in Section 5.1.1. above.

Beita Yusuf attests to the folly of including Islamic law among the applicable 'native law and custom'. According to him:

The *Shari'ah* is...held to be a 'personal law' of Moslem litigants in the Northern States. However, I feel that it can no longer be so described because Moslems have long been opting out of *alkali* courts. Besides, these courts have also been handling cases involving strictly non-Moslem litigants, often without the express consent of the latter.¹⁰⁰

By way of comparison, Islamic law competes favourably with the English and other Western laws of the world. It is a unique law, sharing the features of the Western laws and the indigenous laws of Nigerians. It is written, with a systematised mode of derivation, but not fully codified due to the element of *ʿUrf* in its sources; for customs vary from locality to locality and from time to time. Hence Islamic law is partly rigid and partly flexible. The rigidity is derived from the clear-cut injunctions contained in its primary sources (the Qur'an and the *Sunnah*) while its flexibility is contained in the subsidiary sources which may vary in space and time.

In view of the above highlighted features of the 'law', the 'traditional laws', and the '*Shari'ah* law', it is certain that neither

‘native law and custom’ nor ‘customary law’ can adequately represent ‘*Shari‘ah* law’ in theory and in practice anywhere in the world, and Nigeria in particular. It is therefore desirable to accord Islamic law its due status among the applicable laws in Nigeria. Many other writers and commissioned committees on the laws of the land have equally noticed the problems associated with merging Islamic law with ‘native law and custom’. Complementarily, Ibrahim Tanko Muhammad has called for the removal of Islamic law from the native law and custom in the conclusion of his dissertation.¹⁰¹ That call, to us, is not worthy if we consider the above discussions on this topic.

5.2 Organisational Structure of Nigerian Courts of *Shari‘ah* Jurisdiction

The prevalence of Islam and its law in both the Northern and the Southern (particularly South-Western) parts of Nigeria prior to the British Colonial rule gave the application of *Shari‘ah* law a prominent place among all other applicable laws in the country’s courts, though such a place was not well pronounced in the South. In spite of all efforts of the British judicial officers to whittle down the status of Islamic law, the tradition itself proved difficult to change. The Nigerian Muslims, from the North of the country to the South were, as they still are, consistent in their requests for the *Shari‘ah* to govern all their cases. The different commissions of inquiry on the Nigerian courts since the beginning of this century to date, have been respectively recommending the retention of ‘native’ courts, which applied the traditional law and Islamic law – an indication that tradition is not easy to change. The prospects of Islamic law in Nigerian Courts – if given the chance to operate – can be further deduced from the comments of admiration by ‘even’ the colonial administrators like Lord Lugard and others as repeatedly noted in this work.

However, the colonial legacy of forging legal harmony is a major problem confronting the application of the *Shari‘ah* in Nigeria. The British rulers had set in motion all necessary machinery to apply only ‘codified’ laws in the country, hence the imposition of English law and its systems in the courts. Through legal harmony and the principles of ‘judicial precedent’, quite a number of Islamic cases have suffered nullification by the judgements of the superior courts which apply English law. Such include *Zaidan v. Mohsen* (1973)¹⁰² on the distribution of a deceased Muslim’s estate; *Odebode v. Ashaka* (1944),¹⁰³ on the selection of a Chief Imam; and *Kano N. A. v. Obiara* (1959)¹⁰⁴ on Islamic procedural law and in which

the Justices of the Federal Supreme Court confessed that they had set, at least, two wrong procedures in 'Moslem' court right.¹⁰⁵ We observe that Islamic law recognises 'judicial precedent' only in part; for each and every case ought to be decided with the injunctions of the Qur'an, then the *Sunnah* and then the relevant judgement of early cases. In reply to a letter of investigation forwarded to Caliph 'Umar Abu Musa al-'Ash'ari, the former explained:

You asked me about adjudication between people. I hereby inform you that adjudication is always based on the provision of Qur'an (*sic*) then on the tradition of the Holy Prophet and then on the decision of the ... rightly guided Khalif and finally on consultation of jurists.¹⁰⁶

Caliph 'Umar ranked 'judicial precedent' third in that reply, though without any qualification; hence the validity of its application in Islamic law. However, it is equally on record that some previous judgements viewed to be obsolete were disregarded under the application of judicial precedent¹⁰⁷, hence its limitation as earlier discussed.

Some other major problems confronting the application of the *Shari'ah* in Nigerian courts are the religious crisis and tension, and job insecurity in the country. The Muslims and the non-Muslims are very conscious of their religious demands¹⁰⁸, as such, many non-Muslims who occupy the seat of control and few Muslims who were trained in the British judicial system have no plan to accord Islamic law its proper place in the Nigerian judiciary. As people like Major Nzegwu Kaduna and General Ramat Muritala Muhammad were bent on the abolition and the promotion of Islamic law in Nigeria respectively, the hues and cries that greeted the '*Shari'ah*' in the 1978 Constituent Assembly, the recent debates on its application in Southern Nigeria in the *New Nigeria* newspaper, the sentiments that accompanied the full membership of Nigeria in the Organisation of Islamic Conference (O.I.C.) and the 1987 religious clashes in Kaduna State can go a long way in determining the future of *Shari'ah* legal practice in Nigeria.

From the historical perspectives, many problems are associated with the application of the *Shari'ah* in Nigerian courts, part of which have been highlighted above. Before we discuss such problems as reflected in the statutes and through legislation, it is on record that some recommendations of the Abu Rannat Panel which reconvened in 1962 on the re-organisation of Northern Nigeria courts had created more problems for the application of Islamic law than it had solved. The recommendations that 'native' courts be reduced in

number; and the substitution of Islamic penal law with the Penal Code law are unfortunate.

5.2.1 The Inferior Courts of *Shari'ah* Jurisdiction

Qualification and experience matter in the appointment of lower court judges. Lord Lugard had realised the role religion can play in the society, hence he gave the directive that judges should be appointed from the adherents of the dominating religion in an area¹⁰⁹. Thus, the tradition of Kano State has all along retained the reflection of Islamic dominance in the appointment of Area court judges; for virtually all judges were learned in the *Shari'ah*. The problem is however in many other States like Kwara with not less than 70 per cent Muslim population but with only thirty-one judges of the Area courts learned in the Islamic law out of a total number of 156 lower court judges.

Reliance on paper qualification, particularly the Western type, is another problem inhibiting the progress of lower Courts section in administering Islamic law, though the recommendations of 1976 Area Courts Reform Committee seem adequate in this regard. That notwithstanding, the necessity for many judges to have knowledge of the Arabic language which is the medium of most *Shari'ah* legal manuals is a threat to the survival of the *Shari'ah* in the courts. Many locally trained scholars and jurists whose knowledge of Arabic may comparably surpass that of the Western trained graduates are available to man Islamic courts, but illiteracy in English is often a cause to disqualify them; for the traditional courts have been trailing the Western system with English as medium of operation. For example, with the recent developments on the lawyers' appearance in any Nigerian court, and whereas the lawyers are trained in English language, they may not be able to communicate effectively with the *alkalai* who are mostly conversant with only the Arabic language.

The setting of Area Courts at par with the Magistrates' Courts had its advantages as often recommended by Reform Committees and some individuals. Yet, the discrepancies in their salaries have certain psychological effect on the judges of each set of courts. As the Magistrates are regarded superior to Area Court judges due to the former's legal training in the Western laws and paper qualification¹¹⁰, the latter often regarded themselves superior, for their courts were busier than those of the former. Hence the incessant calls by the Area Court judges for equal pay with the Magistrates.

With the exception of Kano State in which both an Area court judge and a Magistrate Grade III start on the same salary

scale of GL.08 with a night-watchman and 20 per cent of basic salary as remuneration,¹¹¹ and in which both the Upper Area Court judge and a Chief Magistrate earn the same salary of GL.14 with equal benefits, discrepancies abound in the salaries of the Area Court judges and the Magistrates in other States. In Bauchi State, while a Magistrate starts on GL.08; as salary, an Area Court Judge with a Diploma Certificate starts on GL.07¹¹². This is the same as what his counterpart earns in Borno State, but a Magistrate Grade II is on GL.09¹¹³. An Area Court judge in Kaduna State starts with GL.06 as salary while a Magistrate starts on GL.08¹¹⁴ but in Plateau State an Area court member starts on GL.04; an Area Court Judge II on GL.06; and a Magistrate II on GL.09¹¹⁵. In all the sampled States, a Chief Magistrate Grade I earns GL.15 as salary while an Upper Area court judge earns either GL.13 or GL.14. Our recommendation in this regard is contained in the next chapter but meanwhile, we agree with Justice K. Muhammadu Kolo in his view that both the Area court judges and the Magistrates should be at par in terms of status, salary and other benefits¹¹⁶. The practice of status and salary discriminations have contributed in no small measure to the alleged corruption of the Area Court judges.

It has been observed that Area Court judges were highly respected in the society (in the past) and at present their courts are still the busiest because the courts of English orientation are too much involved in technicalities¹¹⁷. As such, the Area Court judges can still gain public confidence, if the causes of the dented image can be removed. Among the causes of the dented image discovered are:

- i. The feudalistic system and judges' relationship with the palaces of rulers by which a judge would be surrounded by some aids as chamberlains – as happens in the palaces. The judge would *ipso facto* maintain such aids in addition to the members of his family. As he pays homage to the Emir with gifts, people pay him back similar homage with presents, hence the prestigious position of the judges and the extensive financial commitments¹¹⁸.
- ii. Hereditary system of the post of Alkali by which a man who was not necessarily learned in the law would be appointed a judge as successor to a late Alkali – being his relative. Since ignorance is a great disease, such an illiterate judge shall do everything possible to cover up his shortcomings¹¹⁹.

Some judicial officers we interviewed observed that the Area Court system can regain its lost prestige with time. They suggested among many other things:

- i. Appointment of judges on merit, paper qualification and experience.
- ii. Giving the judges proper training in all the laws of application in their courts; whether Islamic, English or Customary.
- iii. Gradual dismissal or termination of appointment of the bad eggs among the judges and their replacement with good and well trained ones.
- iv. Proper supervision of their courts¹²⁰.

Indeed, the dented image of the Area court judges is a problem to the application of the *Shari'ah* in Nigeria. But with the above views and recommendations coupled with the importance of their courts, there is hope for a prosperous change.

Area Courts are still a very busy set of courts in the States, at least, handling civil cases as shown by the following table which samples two States, Benue and Kwara:

Table XIX: Statistics of Cases Disposed by the Area Courts and the Magistrates' Courts of Benue and Kwara States in 1983

State	Area Courts			Magistrate Courts		
	Civil	Criminal	Total	Civil	Criminal	Total
Benue	685	359	1,044	-	2,750	2,750
Kwara	9,527	1,628	11,155	66	1,255	1,321

It can be observed from the table that Magistrates' Courts of Benue State have been divested of jurisdiction in civil cases, while such civil cases tried by the Area Courts out-numbered the criminal cases. That reveals the plan of the present judicial administrators (in the Northern States) to confine the jurisdiction of Area Courts to civil cases and that of the Magistrates to criminal cases. Justice K.M. Kolo has once suggested 'that all Area Courts and Customary Courts be divested of jurisdiction in criminal cases¹²¹' and that at least one Magistrate Court be established in each local government area. The implication of these views and an examination of other views are treated under 5.3.1. Meanwhile, discussions of the problems and prospects of the organisational structure of Superior Courts of *Shari'ah* jurisdiction follow.

5.2.2 Superior Courts of *Shari'ah* Jurisdiction

The present constitutional provision for the establishment of *Shari'ah* Courts of Appeal seems adequate except for the optional clause attached to it viz 'for any State that requires it'¹²². In line with our recommendations in the concluding chapter of this work, we feel that *Shari'ah* Courts should be established everywhere in the country while the optional clause should be deleted. As regards staffing of the Courts, an identical set of officials may be retained as practised at present. But the pre-1979 clause in the Laws of Northern Nigeria, Chapter 122, section 5(a) and (b), that *kadis* of the *Shari'ah* Courts of Appeal must be Muslims should be entrenched in the Constitution of the Federal Republic of Nigeria. Its omission is a problem which has not yet matured but may surface anytime. At present many of the Justices of the *Shari'ah* Courts of Appeal are either Arabists in the strict sense of determining their qualification or general Islamists while the specially trained *kadis* in *Shari'ah* law are few. With the amendment to the 1979 Constitution by which 'personal' was removed from 'Islamic Personal Law' which qualified many of the present Justices to be appointed (for they did *Shari'ah* as subsidiary subject), the would-be *kadis* must be specialists in the *Shari'ah*. The inherent problem from the foregoing is the question: to what extent can the present graduates of the Nigerian Faculties of Law be accepted as specialists in the *Shari'ah*, for they (mostly) did comparative studies of law? The answer to this question has been provided under Section 5.4 after a digest of the syllabuses of such Faculties of Law.

The major problem associated with the organisational structure of the (Federal) Courts of Appeal and the Supreme Court on *Shari'ah* matters is the provision that each Justice of either Court should be a legal practitioner in Nigeria. This needs to be reviewed urgently. Further to that, adequate number of qualified *Shari'ah* Justices should be appointed for the two Courts. It is worthy of note that the leading *Shari'ah* Justice in the (Federal) Courts of Appeal has been appointed a Justice of the Supreme Court late last year (1987)¹²³. Thus, only three Justices of the (Federal) Court of Appeal are qualified to handle *Shari'ah* cases at present. Should any of the three fall sick or incapacitated to discharge his duties, *Shari'ah* justice in the court shall be retarded. Further recommendations are made in the next chapter.

5.3 Scope of the *Shari'ah* Law in Nigerian Courts

Application of Islamic law in the lower courts of Northern States of Nigeria was, and still is, under the cloak of native law and custom. The implications of this practice have been discussed

in Section 5.1. Meanwhile, a general survey of the problems and prospects of the *Shari'ah* in Nigerian courts with particular reference to jurisdiction, procedure, and law of administration in the lower and superior courts of record is hereby made.

5.3.1 Courts of Inferior Record

The limitation of Native/Area Courts' jurisdiction to territorial grounds is not a direct but an indirect problem. At present, the Hausa Muslims in the Southern States cannot get their marriages dissolved in their areas of domicile; rather, they have to travel to their home States; for courts of *Shari'ah* jurisdiction are not available in the South. Their Yoruba counterparts in the Northern States are free from such problems; they can take their cases to the Area Courts like any other indigenous Muslim of the area. It is thereby a challenge to the governments of the Southern States to establish courts of *Shari'ah* jurisdiction for not only the benefit of the indigenous Muslims of the States but for all other non-indigenous Muslims. By so doing, the territorial limitation in jurisdiction will become meaningful, since justice will be available in a competent court of jurisdiction in the area where the offence is committed or where the defendant is resident.

The laws provided for administration in the Native Courts which were contained in sections 23 to 28 of the Native Courts Law were re-enacted intact as sections 20 to 25 in the Area Courts Edict for application in the Area Courts. The said laws which cover both civil and criminal jurisdiction of the court(s) can be summarised as follows:

- i. Orders of the Governor.
- ii. *Shari'ah* law in civil cases (by way of interpretation).
- iii. The 'native law' in civil cases where litigants are non-Muslims.
- iv. The Penal Code Law and the Criminal Code in Criminal cases.
- v. The bye-laws of the local government authority operating within the territorial jurisdiction of the Area/Native Court.

It should be noted that powers of the Governor to order a Native/Area Court to administer a particular law¹²⁴ cover both civil and criminal jurisdiction of the courts while the bye-laws of the Native Authority can equally cover the same. Having treated this topic in detail in Section 1 of the chapter (5.1 above), the only additional problem is the codification of 'native law and custom' as recommended by the 1962 re-convened committee of Abu Rannat on the re-organisation of Northern Nigeria laws. If codification of Islamic law is difficult, as

presented in Chapter Four (Section 3.7), we feel that the codification of 'native law and custom' will be impossible. At best, such laws can be committed to writing as the Western Nigerian Customary Laws, yet such should be based on local government basis and even in some instances, on district basis.

In spite of the usefulness of the Inspectorate Division of the Area Courts, some eminent jurists of the English law are still calling for its abolition. Justice K.M. Kolo opined that '...the public have seemed to have lost confidence in the Inspectors as members of the public invariably sidetrack or bypass the Inspectors and petition directly the Chief Judge or the Military Governor or sometimes both...' ¹²⁵. It appears to us from the foregoing that the Inspectorate Division will be scrapped because the eminent jurists are very powerful and influential; above all, the control of that 'division' is vested in them. Should they succeed in this regard, the entire judiciary shall be in a complete mess, especially at this age of economic recession when parties to a suit sometimes provide papers to type the proceedings of their case ¹²⁶. Litigants in the rural areas will be exploited and the alleged corruption against the Area Court judges will become legalised. The Inspectorate Division should therefore be retained.

The adoption and application of Islamic law procedure in case of Islamic matters is a great prospect for the *Shari'ah* in the lower courts of *Shari'ah* jurisdiction. We however have reservations in Order XII in which the judge is empowered to confirm, reconsider, or set aside the recommendations of a panel of arbitration in a case, according to the injunction of Qura'an, 4:35. The view of Maliki School of Law on arbitration is the compulsory confirmation of such recommendations ¹²⁷. Furthermore, the allowance of the legal practitioners to represent any litigant in any court is a threat to the application of the *Shari'ah* in the lower courts. Many problems are associated with the Nigerian system of legal representation. It causes delay of cases, it is expensive; and above all, the qualified '*Shari'ah* lawyers' in the country are very few, if at all there is any ¹²⁸. As there is nothing wrong in legal representation in any court (inferior or superior), necessary provisions must be made to make the lawyers and the judges understand one another and proper codes of conduct must be provided for the lawyers to curb the expensiveness of their service and the unnecessary delays they cause as earlier mentioned.

As long as Islam has no territorial boundary as discussed above ¹²⁹, the non-inclusion of 'Muslim foreigners' in the lower courts' jurisdiction *ex-personae* is inadequate, particularly as omitted in the relevant sections of the Area Courts Edicts. We therefore feel that section 18 (1) (f) of Native Courts Law,

1956, be incorporated in the Area Courts Edicts viz: 'all natives of Nigeria and all native foreigners in cases in which they consent to the exercise of the jurisdiction of the native court'.

Jurisdiction of the lower courts over causes and matters has always been controversial. It will be recalled that the 1976 Area Courts Reform Committee had recommended the partitioning of civil and criminal jurisdiction between the Area and Magistrates' Courts. The recommendation was implemented between 1978 and 1980 in Kano State¹³⁰ before the judgements of the Kano State High Court and the (Federal) Court of Appeal put a stop to it on the basis of its contravention of certain provisions of the 1979 Constitution of the Federal Republic of Nigeria. Similarly, Justice Obi-Okoye of Plateau State had in 1980 scrapped criminal jurisdiction off the Area Courts in urban centres where there were Magistrates but his orders were reversed in 1984 by the Military Governor of the State¹³¹. Mr Dakyen attributed the restoration of criminal jurisdiction to the Area Courts to problem of personnel in the Magistrates.

The Grand Kadi of each of the Northern States supported the recommendation of the 1976 Area Courts Reform Committee that all civil cases should be handled by the Area Courts and all criminal cases by the Magistrates. They opined that such would minimise, if not totally eliminate, the conflict of jurisdiction which occurs frequently between the High Court and the *Shari'ah* Court of Appeal, for by so doing, all civil appeals will lie in the *Shari'ah* Court of Appeal while all criminal appeals will lie in the High Court. *Hawwa Sakajiki v. Muhammad al-Mukhtar Saka jiki* (1986)¹³² was cited as another case of conflict of jurisdiction between the two superior courts by Alhaji Haliru Binji,¹³³ in addition to earlier ones cited in Chapter Four¹³⁴. That notwithstanding, majority of the judicial officers who had direct link with the Area Courts in terms of daily operation were opposed to the civil/criminal dichotomy between the Area Courts and the Magistrates.

Alhaji Yusuf Lere observed that people at the grass-roots do not understand legal technicalities of the Magistrates and to scrap criminal jurisdiction off the Area Courts will be tantamount to denying such people justice in criminal cases¹³⁵. Area Courts should therefore continue to exercise both civil and criminal jurisdiction. The same view with the same reason was given by Alhaji Abdul Aboki who complementarily revealed that in Kano State, there were about one hundred Area Courts and only fifteen Magistrates; hence the State would be forced to employ additional eighty-five Magistrates for the handling of criminal cases¹³⁶. Moreover, the people at the grass-roots regard the Magistrates as agents of the British colonial legacy

and have no confidence in them; whereas they see Area Court Judges as people whom they understand and who reciprocally understand them, hence the confidence they have in one another. Hajia Fati Yusuf Imam held identical views with both Abdu Aboki and Yusuf Lere on the issue¹³⁷. The views of Mrs Z.Y. Aliyu were, however, in contrast to those of the first three discussed¹³⁸. She observed that many of the Area Court Judges were not learned even in the *Shari'ah* which they apply in civil cases. She therefore suggested that the Magistrates should be handling both civil and criminal cases. On his part, C.T. Yerima maintained a balanced stand. According to him, the training and experience of the personnel should determine which court exercises what jurisdiction¹³⁹.

Lastly, the views of C.T. Yerima agree in part with our conclusion and recommendation in the next chapter. But meanwhile, on a temporary note, we observe that the present civil jurisdiction of the Area Courts should be widened to incorporate all commercial transactions and contracts while the Penal Code should give way for Islamic penalties in respect of the offences contained in sections 205 to 404 of the penal code. The following table reveals the comprehensiveness of Islamic penal law and its wide scope to incorporate the offences contained in the Penal Code.

Table XX: Selected Legal Manuals of the Maliki School Doctrines with Relevant Pages to the Prescribed Penalties for Certain Criminal Offences.

Offences under the <i>Shari'ah</i>	Relevant pages in selected <i>Shari'ah</i> Legal Manuals				
	<i>Al-Tasuli</i> Vol. II	<i>Al-Adawi</i> Vol. II	<i>Ad-Dasuki</i> Vol. IV	<i>Al-Khirshi</i> Vol. V	<i>Al-Ju'ali</i> Vol. II
Culpable Homicide	pp. 363-382	pp. 263-290	pp. 237-298	pp. 244-302	pp. 208-215
Hurts	382-391	-do-	-do-	-do-	-do-
Treason	344-355	290-291	298-301	302-304	-do-
Apostacy	-do-	288 & 289	301-313	304-316	216-219
Adultery	355-363	295-299	313-324	316-327	220
Sodomy	-do-	299-300	-do-	-do-	221
Defamation	-do-	301-302	324-332	327-333	222
Theft	-do-	304-309	332-348	333-345	223-225
Robbery	-do-	-do-	348-352	345-349	227
Drinking Alcohol	-do-	302-303	352-359	349-355	226

5.3.2 Courts of Superior Record

Shari'ah Courts of Appeal have no original jurisdiction in cases at first instance. They handle only civil appeal cases from Area Courts. Yet, quite a number of such civil cases cannot lie in the *Shari'ah* Courts of Appeal due to lack of jurisdiction. It can be observed that

the High Court section of the judiciary had manipulated the statutes to favour it in terms of jurisdiction. All appeal cases from the Magistrates (be such civil or criminal) lie in the High Court. Additionally, all criminal appeals from the Area Courts as well as about fifty per cent of the civil cases therefrom lie also in the High Court. Going by the game of number, it presupposes that as much as about 75 per cent of the total appeal cases, (civil and criminal; from the Magistrates' and the Area Courts) lie in the High Court. Furthermore, the High Court has original jurisdiction in both civil and criminal cases. Thus, the *Shari'ah* Court of Appeal entertains only one-sixth of the total litigation of the superior courts while the High Court treats the balance of five-sixths! The projected one-sixth jurisdiction of *Shari'ah* Courts of Appeal is fast reducing through the application of repugnancy clauses of the English law or through judicial precedent of superior courts. These developments pose a serious threat to the existence and survival of the *Shari'ah* Courts of Appeal.

Prospect of *Shari'ah* Courts of Appeal in this regard lies in the fact that High Courts have not been coping and may not be able to cope with the cases registered in them. The following tables reveal the inability of the High Courts to do justice to their annual volume of registered litigations.

Table XXI: Statistics of Criminal Cases Registered in Borno State High Court, Showing Pending and Disposed Original and Appeal Cases from Both the Area and the Magistrates' Courts: 1977-1983

Year		Original	Appeals from Area Courts	Appeals from Magistrates' Courts	Total
1977	Disposed	19	10	51	80
	Pending	320	13	196	529
1978	Disposed	23	16	69	108
	Pending	284	22	218	524
1979	Disposed	21	13	62	96
	Pending	296	18	216	530
1980	Disposed	25	20	71	116
	Pending	194	31	232	457
1981	Disposed	107	21	58	186
	Pending	442	30	167	639
1982	Disposed	129	17	60	206
	Pending	531	24	175	730
1983	Disposed	132	18	56	206
	Pending	872	23	266	1,161

Table XXII: Statistics of Criminal Cases in Benue State High Court, Showing Disposed and Pending, Original and Appeal Cases: 1977-1983

Year		Original	Appeal	Total
1977	Disposed	26	22	48
	Pending	97	125	222
1978	Disposed	18	12	30
	Pending	136	166	302
1979	Disposed	10	35	45
	Pending	145	207	352
1980	Disposed	32	114	146
	Pending	63	167	230
1981	Disposed	27	22	49
	Pending	57	114	171
1982	Disposed	22	35	57
	Pending	97	289	386
1983	Disposed	3	20	23
	Pending	76	291	367

Table XXIII: Statistics of Civil Cases in Benue, Borno and Kaduna States High Courts, Showing Disposed and Pending, Original Suits: 1977-1983

Year		Benue	Borno	Kaduna
1977	Disposed	81	40	120
	Pending	772	305	138
1978	Disposed	59	56	147
	Pending	1,359	347	182
1979	Disposed	92	70	203
	Pending	1,586	411	253
1980	Disposed	858	67	240
	Pending	1,072	366	327
1981	Disposed	159	107	236
	Pending	509	579	319
1982	Disposed	193	165	269
	Pending	1,413	650	372
1983	Disposed	142	200	249
	Pending	1,555	795	412

Table XXIV: Statistics of Civil Appeal Cases in Benue, Borno and Kwara States High Courts, Showing Disposed and Pending Suits: 1977-1983

Year		Benue	Borno	Kwara
1977	Disposed	15	150	26
	Pending	80	188	39
1978	Disposed	11	147	28
	Pending	117	211	40
1979	Disposed	15	165	32
	Pending	162	213	45
1980	Disposed	105	152	25
	Pending	190	205	40
1981	Disposed	27	150	22
	Pending	112	225	42
1982	Disposed	24	175	31
	Pending	225	389	64
1983	Disposed	24	155	13
	Pending	257	355	50

In addition to the above self-revealing statistics on the inability of the High Courts to cope with the volume of their litigation, the establishment of numerous special tribunals and judicial commissions of inquiry further compound the problems and inability of such courts to cope with the daily increasing volumes of litigation.

In view of the above analysis, it shall be desirable to widen the jurisdiction of the *Shar'ah* Courts of Appeal, at least in the following matters:

- i. Original jurisdiction in the present letters of their appellate jurisdiction in the first instance and in the following matters in the second instance; Land, Contracts and Commercial Transactions.
- ii. Appellate jurisdiction in all the civil cases determined by the Area Courts in which the parties are Muslims or where they (parties) consent to be governed by Islamic law whether or not they are Muslims.
- iii. Criminal, original, and appellate jurisdiction in some matters of Islamic interest like adultery, defamation and theft, etc.

Expansion of the jurisdiction of the *Shar'ah* Court of Appeal is long overdue and the above observation may be countenanced on a temporary basis pending the implementation of our

suggestions and recommendations in the next chapter. At present, the *Sharī'ah* Court of Appeal can entertain a land case only when connected with inheritance while section 242 (2) (e) of the 1979 Constitution which has allowed such courts to entertain quite a number of cases has been subjected to adverse interpretations by the English oriented courts. We feel that the above suggestions will reduce, if not eliminate, the conflict of jurisdiction between the High Courts and the *Sharī'ah* Courts of Appeal. Annual case returns of *Sharī'ah* Courts of Appeal will also increase as the Kadis will, thus justify the government spending on their courts. For example, when the Kwara State *Sharī'ah* Courts of Appeal was tested with additional case load through an enactment by which appeals of Islamic cases lie directly in them from the Area Courts, and not through Upper Area Courts (any longer), it proved its worth by disposing over a hundred appeal cases in a year' as against its previous years return of less than thirty disposed cases per annum. Furthermore, the same suggestions will reduce the congestion in the High Courts, though the above tables reveal less delay of civil cases as compared to criminal cases in the sampled states. That notwithstanding, if the *Sharī'ah* Court of Appeal can share the handling of criminal cases with the High Courts, the congestion will reduce drastically. In the two tables on the criminal cases of the High Courts in the sampled States, the courts could dispose only about fifteen per cent of the registered cases in each year. Justice delayed is justice denied; hence the importance of relieving the High Court of some of its jurisdiction.

The perpetuation, or retention, of cases in the High Court by its judges is a major threat to reform in this regard. It will be recalled that instead of such judges to propose appropriate recommendations on how to decongest their courts to the government, they adamantly retained cases of Islamic interest in such courts, relying on the assessor's recommendations in adjudication. It is unfortunate that assessors should be appointed from the Area court judges instead of transferring the cases to the appropriate *Sharī'ah* Court of Appeal. In Gombe (Bauchi State) the Area Court judges raised eyebrows at the appointment of one of them as assessor by the High Court of the State in its appellate session because the appointee was very junior to many of the remaining lower court judges¹⁴⁰. Finally, on the jurisdiction of the *Sharī'ah* Court of Appeal, all the Grand Kadis (we interviewed) welcomed original jurisdiction for their courts as well as widening their appellate jurisdiction. They equally supported the idea of conferring criminal jurisdiction on their courts, all things being equal.

Justice Abdulkadir Orire lamented that, at present, there is nothing a *Shari'ah* Court of Appeal can do in a case of adultery in which a woman is enticed by another man without firstly terminating her existing earlier marriage with the husband. The court shall only separate the two lovers for 'contracting marriage upon a marriage'; it cannot punish for adultery!¹⁴¹

The laws of application in the *Shari'ah* Courts of Appeal seem adequate, particularly with the inclusion of the clause which approves the *Urf* of the locality; but its limitation to the Maliki doctrines is improper.

Furthermore, the inclusion of 'natural justice, equity and good conscience' among the applicable laws in the *Shari'ah* Court of Appeal is dangerous. In view of the fact that such repugnancy clause is controversial even by the interpretation of the English law jurists, it may be removed from the *Shari'ah* Court of Appeal laws. Some lazy and incompetent judges may hide under the cover of such a clause to decide some cases with their own private interpretation where some appropriate text (*Nass*) of the divine law may hold sway.

To arrest the possible act of causing harm to litigants through (unsavoury) private interpretations by the judges, the *Shari'ah* has, fortunately, been semi-codified – as contained in the Rules of Practice and Procedure of the *Shari'ah* Courts of Appeal – while the substantive law is written in legal manuals. However, the substantive *Shari'ah* law should be codified in the form we suggested earlier in Chapter Four (4.3.7). All these suggest the prospect of the *Shari'ah* in the courts of *Shari'ah* jurisdiction. Yet, we feel that resident Kadis should be appointed in the principal towns to avoid accident risk through frequent travels of the *Kadis*.

The problem of legal representation in the superior courts of *Shari'ah* jurisdiction remains unsolved. As mentioned earlier, the products of the Nigerian universities offering Islamic law are not sufficient in number to cope with *Shari'ah* litigations in the courts. At present, many non-Muslims and non-*Shari'ah* trained lawyers practise in *Shari'ah* Courts as happened in the case of *Karimatu Yakubu and Alhaji Yakubu Tafida Paiko* at Niger State *Shari'ah* Court of Appeal. The menace of this inadequate *Shari'ah* representation cannot be solved until a *Shari'ah* College of Advocates is established in the country. Yet, care must be taken and effective code of conduct must be provided for *Shari'ah* lawyers to prevent their being corrupted through an imitation of the English system.

Lastly, on the *Shari'ah* Courts of Appeal, as long as *Shari'ah* law procedure has been allowed in the lower and the superior courts of *Shari'ah* jurisdiction, it is envisaged that such will still

be allowed when the *Shari'ah* Courts are conferred with criminal jurisdiction. Evidence law has many things in common with Islamic law of evidence as demonstrated by Justice Abdulmalik Bappa Mahmud in his paper entitled 'Evidence Under Islamic Law'⁷¹⁴⁸, yet, areas of disagreement between the two are equally numerous and fundamental. Islamic law of evidence should therefore govern Islamic cases in all its ramifications.

The law recommended for administration on *Shari'ah* cases in the (Federal) Court of Appeal and the Supreme Court should not be different from the laws of application in the *Shari'ah* Courts of Appeal, hence the relevance of our discussions in the preceding paragraphs to the two most superior courts. As we observed in the organisational structure of the courts above – in relation to the *Shari'ah* – we feel that the jurisdiction and procedural systems in them should follow the pattern suggested in the concluding chapter of this work. Problems of the *Shari'ah* in both the (Federal) Courts of Appeal and the Supreme Court are not much of scope of jurisdiction but of structure and organisation – including qualification of judges and legal representation.

It will be recalled that there is no mention of *Shari'ah* practice and procedure for Islamic cases in the Rules of the (Federal) Court of Appeal and those of the Supreme Court. Consequently, the learned justices of the (Federal) Court of Appeal have been applying the repugnancy clauses in an indirect manner by forcing the lower courts to set up arbitration panels in dissolving marriages, knowing fully well that the judges were bound to effect the terms of the arbitration. The eminent justices have also been interpreting the 1979 Constitution in the English way, which is detrimental to the *Shari'ah*. Furthermore, only one Justice learned in the *Shari'ah* has been appointed for the Supreme Court and the only test case that lay there was struck out.

Finally, in this regard, many courts of *Shari'ah* jurisdiction are accommodated in unbecoming premises – a reflection of contempt for such courts by the administrators in both political and judicial arena. However, the prospect of the *Shari'ah* is not so much in the magnificent building but in its efficacy in the area of justice dispensation and in this regard, the few reported cases in the two volumes of the *Shari'ah* reports have given pass marks to the eminent justices of the courts. Should the co-operation of the *Shari'ah* Courts of Appeal with the publishers of the Law Reports continue, many English trained jurists who are ignorant of the efficacy of Islamic law will learn therefrom – its importance and relevance to the Nigerian society. Meanwhile, we discuss the training of personnel for the courts of *Shari'ah* jurisdiction with emphasis on an appraisal

of the syllabi of the Nigerian Faculties of Law offering *Shari'ah* law as a subject.

5.4 Training of Personnel for Nigerian Courts of *Shari'ah* Jurisdiction

The problem and prospect of any institution lie mostly in the provision made to perpetuate it, like training of personnel. *Shari'ah* legal practice in Nigeria cannot be exempted from this philosophy and we have mentioned earlier¹⁴³ that since the advent of the British rule in the country efforts had been geared towards the training of selected indigenes of Northern States (in particular) to administer English oriented laws in the Magistrates' and the High Courts. We hereby examine (in this section) the plight of the *Shari'ah* personnel in Nigerian courts through a discussion of *Shari'ah* legal training in the country. A brief historical analysis of the training institutions is given; followed by a digest of such institutions' curricula; and finally a discussion of the teaching problems.

5.4.1 Historical Sketch of the Nigerian Training Institutions on *Shari'ah* Law

Prior to the independence of Nigeria in 1960 and a little thereafter, there was, formally, only one school for the training of *Shari'ah* personnel for Nigerian courts. A few years after the Independence, a university joined the school and at present, there are four universities and a good number of State Colleges for the *Shari'ah*. In discussing these institutions, we focus on the pioneering school in the course and the universities which joined it later.

The first formal Arabic School in Nigeria was established in 1927 in Maiduguri but it survived for about five years only¹⁴⁴. The medium of instruction in the school was Arabic. In 1930, a *Shari'ah* school was established in Sokoto and Kano respectively while many other towns planned to establish similar schools. The colonial authorities however directed that only one of such schools should operate in the North – with students' admission from all parts of the Region – hence the subsequent establishment of Kano Law School in 1934¹⁴⁵. Tutors in the school were recruited from Sudan while the first set of students comprised the old students of the closed schools in Borno, Kano and Sokoto, and a few others from elsewhere. Arabic was retained as the medium of instruction in the school and the duration was four years. The following subjects were taught: *al-Fiqh* – Islamic Law and Jurisprudence, *al-Hadith* – Science of the Acts, Deeds, and Sayings of Prophet Muhammad, *al-Tafsir* – Qur'anic Exegesis, *an-Nahw* – Arabic Grammar; *al-*

Balaghah – Arabic Rhetoric, *at-Tarikh* – History; *al-Hisab* – Arithmetic/Mathematics; *al-Jughrafiyah* Geography, and *Khatt an-Naskh wa ar-Ruq'ah* – Cursive Arts of writing. *Fiqh* was taught three times in each of the six working days of the week, totalling eighteen periods per week per class from Year One to Four. Students were continuously assessed through teaching demonstrations in the class in order to gain practical experience¹⁴⁶. The impact of the school on the society could not be over-emphasized before its curriculum was changed in 1947.

The British government changed the Kano Law School of 1934 to School for Arabic Studies in 1947. The duration of the course changed to five years and the Sudanese head was replaced with an English head. New courses like English language, Physical Education, and a few others were introduced¹⁴⁷. The change was resented by the populace who protested vehemently. Subsequently, a Higher Muslim section was introduced in 1954 as a branch of the school. The section was training students in Islamic law for four years and this enabled them to gain admission into the universities of some Arab countries like Iraq, Sudan, Saudi Arabia, and al-Azhar in Cairo. The five-year training section continued with its two branches: Law and Teaching. Students used to offer the same subjects (including *Fiqh*) together in the first three years. They would thereafter separate for specialisation in either teaching or law in the last two years. By 1960, another section had been added to the school. It offered a special course for students of Arabic seeking admission into Nigerian universities¹⁴⁸. Indeed, products of the different sections of the school had been playing significant roles in the administrative, educational, and judicial departments and ministries of the States (particularly in the North) and of the Federation.

Faculty of Law was among the foundation Faculties of the Ahmadu Bello University established in 1962. It developed from the former Legal Department of the Institute of Administration 'which had been started as the first Law School in West Africa in 1959'¹⁴⁹. The Faculty was running four principal courses:

- a. A degree in Law for three years after which the students would proceed to Law School in Lagos for one year in order to acquire 'practical professional training necessary for call to the Nigerian Bar'¹⁵⁰. The first four students with LL.B. degree graduated in 1965.
- b. A diploma course of two years duration, designed to produce better-qualified personnel for the Area Courts and the court inspectorate in the Northern States. The

first fourteen holders of the Diploma Certificate passed out in June 1965.

- c. A judicial training course of three months duration for the personnel of the Area Court system, giving them 'basic introduction to the codified system of criminal law and procedure introduced in 1960'¹⁵¹. The medium of instruction was English and Hausa, as appropriate.
- d. A diploma course in Islamic Studies. It was designed for fifteen months duration, covering wide area of Islamic Law with emphasis on the Maliki School doctrines. It was envisaged that holders of the Diploma would be appointed *Alkalai* in the Area Courts.

A separate department for Islamic Law was established in the Faculty of Law at the beginning of 1976/77 session while the first *Shari'ah* products graduated and proceeded to the Law School in 1979. The new department also offered, as it still does, a Diploma Course in the *Shari'ah*. Each of the degree and the diploma courses was designed for a duration of three years¹⁵². The Centre of Islamic Legal Studies which had been a branch of the Faculty of Law, handling Judicial Training Course, now offers two types of the course, each of three months duration: (a) Basic and (b) Advanced.

As new universities were established, Faculties of Law were given priority, often with *Shari'ah* bias in the Northern States. After the assumption of the status of a full-fledged university by the Bayero College, its Faculty of Law designed a programme of harmony between *Shari'ah* Law and Common Law. The Faculty offers a four-year degree programme in which 'both common law and Islamic law are accorded equal status'¹⁵³. The objective was highlighted to be the production of lawyers who would be well grounded in common law and Islamic law and who would be capable of practising both¹⁵⁴. The 1981/82 Prospectus of the Faculty stipulated that a candidate

must satisfy the Faculty of Law that he has such knowledge of Arabic language as to enable him adequate (sic) access to the primary sources of Islamic law¹⁵⁵.

In writing the final-year project by the students, each topic must be handled on comparative basis with two supervisors: one for the aspect of Islamic Law and the other for Common Law.

The Faculty of Law in the University of Sokoto (now Usman Danfodiyo University) was, prior to October 1980, the Department of Law under the Faculty of Arts and Islamic Studies. It was headed by a Sudanese who served the university

for only two years. On becoming a faculty, three departments were established: (a) Islamic Law (*Shari'ah*); (b) Public Law and Jurisprudence; and (c) Private Law and Business Law. The departmentalisation notwithstanding, 'the law programme and the structure of the degree awarded... remain as envisaged at the inception of the Department of Law'¹⁵⁶. It will be recalled that at its inception, the aim of the programme was

to produce graduates who are well grounded in both Common Law and Islamic Law, in recognition of the nature of Nigerian society in which both these systems of law play an important part. The two systems are accorded equal status in the programme. Consequently, in addition to purely Islamic law courses in the curriculum, elements of Islamic law are taught also as integral parts of the seemingly purely Common Law wherever necessary.¹⁵⁷

Aims and objectives of the Faculty of Law, Bayero University, Kano, are therefore identical with those of the Faculty of Law, University of Sokoto except that the approaches are different. As there is departmentalisation in Sokoto, there is none in Kano. The advantage of this harmony between Islamic law and Common law in the training is the opportunity afforded the students who are not confined to the walls of 'Islamic Personal Law' but the whole corpus of the *Shari'ah*. The study of the Arabic language is also made compulsory in the Faculty of Law of Sokoto University, but the projects are not necessarily to be written on comparative basis as in its counterpart at Bayero University, Kano. The following table analyses the final-year projects submitted to the Faculty of Law in the University of Sokoto from 1981 to 1986.

Table XXV: Statistics of Number and Nature of Projects Submitted by Final Year Students of the Faculty of Law, University of Sokoto: 1981-1986

Area of Study	1981	1982	1983	1984	1985	1986	Total
Islamic Law	-	2	7	6	9	13	37
Comparative Law (Islamic and Common)	-	-	4	3	8	10	25
Others	1	2	9	12	15	35	74
Total	1	4	20	21	32	58	136

Source: Approved Lists of Final Year Essays and 'Interview'.

The Department of *Shari'ah* in the Faculty of Law, University of Maiduguri, is relatively young. It started in 1980/81 academic year and its first set of products that went to the Law School graduated in 1984.¹⁵⁸ Out of the eleven graduates of *Shari'ah*

law in the second set (1985), one passed with Second Class (Upper Division), eight with Second Class (Lower Division) and two with Third Class.¹⁵⁹ The programme and structure of the department are identical with those of their counterparts in Ahmadu Bello University just as the Faculty of Law in both Bayero University and the University of Sokoto share identical features.

It can be deduced from the foregoing that the depth of *Shari'ah* knowledge from the old Kano Law School was greater and superior to that of the Nigerian universities offering *Shari'ah* courses. With Arabic as medium of instruction, students were able to cover a wide ground in *Shari'ah* training as they could consult the primary sources with ease. Therefore, the scrapping of the earlier *Shari'ah* Colleges of Borno, Kano, and Sokoto and the establishment of only one for the country was unfortunate. Had the British government allowed those schools to survive along with the others planned by other Emirates, there would have been sufficient number of *Shari'ah* court personnel, well bred, trained, and immune against the allegation of ignorance which is now attached to many Area Court judges. The action of the government in this regard was caused by the fear that *Shari'ah* law would dominate, and the attempt to forge legal harmony in which the English law would prevail. The government had actually succeeded in this regard and the plan of introducing English language and changing the curriculum of the Kano Law School in 1947, coupled with the removal of the Sudanese head for an English head, actually yielded some fruits.

Protest of the public to the change in the curriculum of the School reveals the relation of law to the society. At present, Nigerian Muslims are agitating for *Shari'ah* law to govern their cases but the problem in this regard may turn to be personnel. If the Faculty of Law at the University of Sokoto can produce less than 40 *Shari'ah* personnel *per se* in six years (1981-1986), and with only four universities producing such personnel, for how long can the country wait for the application of *Shari'ah* law *in toto*?

Viewing it from another perspective, there is confusion in the universities as to the methodology of training *Shari'ah* personnel as discussed below. Should the *Shari'ah* be fused with Common Law for the production of lawyers learned in both as in Bayero University or the *Shari'ah* be offered as a distinct course as in Ahmadu Bello University? Each has its merits and demerits, though neither can be compared to the old Kano School in terms of depth of *Shari'ah* knowledge.

The situation has changed for the better. For the past 23 years, thousands of such qualified lawyers have been produced [Editor]. This confusion was caused by the dilemma in which

the universities found themselves – as created by the Law School. The system of Bayero University is undoubtedly over-tasking the students by which they are awarded a single degree after working for two. Yet the approach of the University of Maiduguri is not the best substitute because the Law School is not training *Shari'ah* advocates; hence students of the university are professionals in their subsidiary subjects.

For a meaningful solution to the crisis, the mind must be brave to accommodate any sort of castigation and intimidation which befell Dr S.K. Rashid of Sokoto University between 1982 and 1983. Initially, the law programme of the university contained only about 30 per cent of Islamic law. Dr Rashid worked with his colleagues on the syllabus, after consultations with the Vice Chancellor who detested the ratio of Islamic law to the Common law in the old programme. The new programme was eventually approved by the Senate of the university and the Law School in Lagos. Through the Students Union (particularly law students) of the university, Dr Rashid was castigated in a petition to the Vice Chancellor. The students' demand centred on limiting *Shari'ah* courses in their academic programme to 'Islamic Law of Personal Status'. It was later discovered that some eminent jurists of Western training in and around the university were instigating the students. These students and their mentors wanted courses like *Tafsir* and *Hadith* to be removed from the curriculum.¹⁶⁰ The comments and roles of both J.C. Nkala¹⁶¹ and Beita Yusuf in the crisis seemed antagonistic to the *Shari'ah*. It is equally noteworthy that the few lecturers of *Shari'ah* law in the higher institutions are not accorded respectable status by their overwhelming Common Law counterparts. The humiliation suffered by the former at a national conference of law teachers in Jos in 1984 led to the formation of the Association of Islamic Law Teachers in July 1985. Meanwhile, an appraisal of Islamic law curriculum vis-à-vis the Common Law curriculum follows.

5.4.2 *Shari'ah* Curriculum in the Training Institutions and Faculties

The quality of acquired knowledge in any branch of learning by the students can be attributed largely to the perception of the teachers and experts (in that subject) who designed its syllabus or taught it. Indeed, the designers and fashioners of legal education in Nigeria did not perceive, to a large extent, the social factor of the teeming masses but of a few elites. According to the Report of the Committee on the Future of the Nigerian Legal Profession,¹⁶² the proposed syllabus for degree in Law was as follows:

- Year I:
 - a. The Nigerian Legal System
 - b. The English Legal System
 - c. Law of Contract
- Year II:
 - a. Criminal Law (English and Nigerian)
 - b. Law of Tort
 - c. Equity
 - d. Land Law
- Year III:
 - a. Jurisprudence and Application of Nigerian Customary Law
 - b. The Law of Evidence
 - c. Nigerian Constitutional Law, and
 - d. Any *one* of the following:
 - i. Islamic Law
 - ii. Law of Domestic Relations and Succession
 - iii. Commercial Law including Principles of Company Law and Partnership
 - iv. Conflict of Law; and
 - v. Public International Law.

The only relevant parts of the syllabus to the majority of Nigerian populace are 'a' of Year III and 'd (i)' of the same year which are optional in a way. Yet, the study of the two was designed with the bias to whittle them down. Details of each of the mentioned 'a' and 'd (i)' are as follows:

- a. *Jurisprudence and Application of Nigerian Customary Law:* Legal theory, and the analysis of legal concepts. Instead of the third part of the London LL.B. syllabus in Jurisprudence dealing with Sources and Forms of English Law, there should be a substituted course which would cover in detail, and with the aid of Case law and legislation, the principles governing the application of Customary law in its various aspects in Nigeria; for instance of mode of proving it, judicial interpretation, the repugnancy doctrine, etc.¹⁶³
- b. i. *Islamic Law:* Islamic jurisprudence: history and development of Islamic law and its different schools. The law according to the dominant school in Nigeria in such matters as marriage, legitimacy, guardianship, succession, gifts and *waqf*.¹⁶⁴

Focus in the teaching of the 'Application of Nigerian Customary Law' would *ipso facto* be on its measurement with the repugnancy doctrine while the scope of Islamic law was too narrow in addition to its optional status.

At least, 70 per cent of the recommended courses in 1959 are still compulsory in Nigerian universities as at the time of writing this work because, according to an Information Circular No. 8 1986, the 'Core Subjects Requisite for Admission to the Nigerian Law School' (as from 1988/89 session) are:

- i. The Law of Contract
- ii. The Law of Tort
- iii. Criminal Law
- iv. Constitutional Law
- v. Land Law
- vi. The Law of Equity and Trust; and
- vii. The Law of Evidence.

As long as no lawyer can be called to the Bar without passing through the Law School, the seven subjects listed above must be compulsory in any Nigerian Faculty of Law. It can be observed that neither Islamic Law nor Customary Law was among the core subjects, hence the predicament and confusion of the Nigerian institutions training *Shari'ah* personnel. The programme of each institution is as follows:

1. In Ahmadu Bello University, all law students at present (regardless of specialisation) offer the following courses in the first year of the programme:

- a. Nigerian Legal System
- b. Law of Contract
- c. Criminal Law
- d. Constitutional Law
- e. Introduction to Islamic Law; and
- f. General Paper.

In Year Two, students specialising in the *Shari'ah* offer:

- a. Commercial Law
- b. Nigerian Land Law and Family Law
- c. Law of Tort (including Islamic Law of Tort)
- d. *Mu'amalat* (Transaction)
- e. *Tafsir* and *Hadith*.

In Year Three they offer:

- a. Jurisprudence and Legal Theory
- b. Equity and Trust
- c. Company Law
- d. Islamic Law of Succession
- e. Evidence (i) *Muraḥaṭ* (ii) Statutory and Islamic Law of Crime.
- f. Criminal and Civil Procedure.¹⁶⁵

In Year One, only 'Introduction to Islamic Law' is the *Shari'ah* subject while four out of the six subjects of Year Two are *Shari'ah* in nature. In Year Three, two out of the six subjects are *Shari'ah*, making a total of seven *Shari'ah* subjects out of eighteen, i.e. about 39 per cent.

2. Bayero University runs, at present, both three- and four-year law programme. The courses of the two programmes are:

- i. Law of Contract
- ii. Constitutional and Administrative Law
- iii. Islamic Law of Contract
- iv. Sources and Development of Islamic Law
- v. Criminal Law
- vi. Family Law in Nigeria: (a) Islamic Family Law; (b) English Family Law; and (c) Customary Family Law.
- vii. Law of Property: (a) Land Law; and (b) Law of Personal Property
- viii. Commercial Law (Agency – Sale of Goods and Hire-Purchase)
- ix. Tort
- x. Jurisprudence and Legal Theory
- xi. Evidence
- xii. Company Law and Partnership
- xiii. 'Introduction to Law and the Nigerian Legal System' of the first year of the three-year programme is more or less equivalent to 'Legal Systems (Islamic, Nigerian and English)' of the first year of the four year programme.
- xiv. 'Principles of Equity and Trusts' is a compulsory course in the final year of the three-year programme but optional/elective in the final year of the four-year programme, though by its assumption of a core course for admission into the Law School against 1988/89 session, it must be made compulsory;
- xv. The elective courses out of which one must be offered are:
 - a. International Law
 - b. Conflict of Law
 - c. Criminal and Civil Procedure
 - d. Revenue Law
 - e. Conveyancing; and
 - f. Law of succession and Administration of Estate including the Islamic Law of *Mirath*, *Wasiyyah* and *Waqf* – which is though

compulsory in the final year of the four-year programme in lieu of 'Principles of Equity and Trusts' as explained above, will now be uniformly made an optional course due to the assumption of 'core course' by the 'Principles of Equity and Trust' .

The only course offered in the second year of the four-year programme but totally omitted in the three-year programme is '3(a) *Usul al Fiqh*; (b) *Tafsir* and *Hadith*'. Nonetheless, the programme did not fail to add the following information which indicates the comparative handling of the courses:

It should be noted that in each of the above mentioned courses, and wherever it is not mentioned, both Common Law and the Corresponding Islamic Law are the integral parts of the course.¹⁶⁶

This quotation has revealed that, at least, 50 per cent of the programme is Islamic in nature as compared to the 39 per cent of the programme of Ahmadu Bello University's law degree – with specialisation in the *Shari'ah*. The only reservation we have in the system of Bayero University is the depth of *Shari'ah* knowledge envisaged; for it is not impossible that where a *Shari'ah* course is taught for 30 hours in Ahmadu Bello University system, only 15 hours may be allotted it in the system of Bayero University due to the comparative approach.

3. According to the 1983/84 Prospectus of the Faculty of Law, University of Sokoto, a total of 130 units are made available to the students for the period of four years, distributed as follows: 32 units in Year One, 33 in Year Two; 32 in Year Three and 33 in Year Four. Statistics of the unit distribution shows 3 units for the Project, a total of 6 units for Arabic, and 53 units of *Shari'ah* courses totalling 62 units for any student who may claim to be interested in writing the Project in the area of *Shari'ah*. Additionally, every *Shari'ah* law student should offer 8 units of General Studies, 54 units of Common/English Law courses before Evidence Law becomes a core course and 60 units thereafter. The courses with their respective total number of units are:

i. Nigerian Legal System	—	6 units
ii. Criminal Law	—	6 units
iii. Law of Contract	—	6 units
iv. Constitutional and Administrative Law	—	6 units
v. Law of Tort	—	6 units
vi. Land Law	—	6 units
vii. Commercial Law	—	6 units

viii. Jurisprudence	—	6 units
ix. Equity and Trusts	—	6 units
x. Law of Evidence	—	6 units

It is worthy of note that 'Law of Evidence' was hitherto an optional course along with the following subjects, out of which only one should be offered:

a. Company Law and Partnership	—	6 units
b. Public International Law	—	6 units
c. Conflict of Laws	—	6 units
d. Family Law	—	6 units
e. Labour Law	—	6 units
xi. Qur'an as Source of Law	—	2 units
xii. <i>Usul al-Fiqh</i> I and II (3 units in each of Years I and II)		
xiii. Development and Administration of Islamic Law	—	3 units
xiv. <i>Tafsir</i> and <i>Hadith</i>	—	2 units
xv. Islamic Law of Crimes and Tort	—	4 units
xvi. Islamic Law of Contract	—	6 units
xvii. Islamic Family Law	—	6 units
xviii. Islamic Property Law	—	6 units
xix. Islamic Law of Evidence and Procedure	—	6 units
xx. Islamic Law of Succession	—	6 units
xxi. Either 'Islamic Law of War and Peace' — or 'Islamic Company Law and Partnership' — (being optional courses)	—	6 units
xxii. Project	—	3 units
xxiii. Arabic (2 units in each of Years I, II and III)		6 units
xxiv. General Studies (4 units in each of Years I and II)	—	8 units

The Regulations of the University of Sokoto, particularly of the Faculty of Law, allow a student to register for a minimum of 30 units and a maximum of 34 units in the first year, a minimum of 31 units and maximum of 35 units in the second year (including the units for General Studies in the two years), and 'a minimum of 27 units and a maximum of 30 units in the subsequent years'.¹⁶⁷ Thus, if a student should decide to register for the minimum number of units in the four years, he would have a total of 115 units, the exact graduation requirement (to earn) in the Faculty of Law. Hence, such a student would not register for the optional courses totalling 12 units (6 units in Islamic Law and 6 units in Common Law); though 'Law of Evidence' which was hitherto among the optional Common Law courses shall be assuming a compulsory status from 1988/89 session in the Law School.

The regulations should therefore be amended to reflect the changes. With this programme elucidating the programme of the Faculty of Law in the Bayero University, Kano, with which it shares similar features, the ratio of Common Law courses to Islamic Law courses should be adjusted to put both (at worst) on equal proportion. Ratio 60:53 (including a 6 unit *Shari'ah* optional course), i.e. 53.1:46.9 per cent or 60:47 (excluding it – and excluding 6 units of Arabic in both cases) i.e. 56.07:43 per cent does not give a balanced distribution. More courses of the *Shari'ah* must be taken in lieu of 'Jurisprudence', 'Commercial Law' or 'Nigerian Legal System', though we feel very strongly that the last of the three should be retained and taught. If at least 'Commercial Law' can be reduced to optional course and a 6 unit *Shari'ah* optional course is up-graded to a compulsory course; ratio of Common Law to Islamic Law core courses shall be 54:53 units. However, this arrangement in its present form is neater than that of Bayero University in which either of the two laws may take the bulk of hours allocated to each course at the expense of the other.

4. The Law curriculum of the University of Maiduguri explains better than that of its counterpart in Ahmadu Bello University with particular reference to LL.B. degree in *Shari'ah*. Before a student of the Department of *Shari'ah* can qualify to graduate, he must earn about 63 or 66 units in Common Law and 43 units in *Shari'ah* Law, a ratio of about 60:40 per cent which is very close to 61:39 per cent of the Ahmadu Bello University Law Programme. In addition to the seven core courses for admission into the Law School, a *Shari'ah* Law student is required to offer about four optional courses totalling not less than 18 units in the Common Law Programme. Should such 18 units be shared by the two on ratio 2:1 (*Shari'ah: Common*), total units of the *Shari'ah* courses will rise to 55 while that of the Common Law will reduce to 54 – a seemingly balanced distribution. The *Shari'ah* courses in the present programme are balanced in outline but heavily compressed. Each of the following courses need to be appropriately separated, allotting not less than 3 units to each sub-division: 'Islamic Law of Testate and Intestate Succession', 'Islamic Law of Crimes and Evidence', and 'Islamic Law of *Mu'amalat* (Transaction) and Torts'. Furthermore, *Tafsir* and *Hadith* are not adequately represented.
5. We have given a list of the nine subjects offered by the 1934 Kano Law School, though we have no record of how many periods were taught per week per subject except for *Fiqh*. Yet the teaching of only nine subjects for a duration of four

years indicates the depth of knowledge acquired in each subject. Alhaji Haliru Binji described how students of the school often committed to memory the content of *Tuhfatu'l-Hukkam* and *Mukhtasar Khalil*, not to talk of the *Risalah*, and the digest of the commentaries and glosses of each book by different writers.¹⁶⁸ However, the re-established Higher Muslim section of the school in 1954 had a curriculum fairly comparable to that of the old curriculum of 1934. The following table shows the subjects offered in the Higher Muslim section of 1954 with number of periods per week per subject in each of the four years.

Table XXVI: Subjects and their Periods in the Curriculum of the 1954 Higher Muslim Section of Kano School of Arabic and Islamic Studies Year by Year

Subject	Number of Periods Per Week				
	Year One	Year Two	Year Three	Year Four	Total
at-Tawhid	2	2	2	2	8
al-Fiqh	8	8	8	8	32
al-Hadith	2	2	2	2	8
at-Tafsir	2	2	2	2	8
al-Qur'an al-Karim	2	2	2	2	8
at-Tarikh al-Islami	2	2	2	2	8
al-Adab al-‘Arabi	2	2	2	3	9
al-Qira’ah wa an-Nusus	2	2	1	2	7
an-Nahw	4	3	3	3	13
al-Insha’	2	1	1	2	6
al-Hisab	2	2	2	3	9
al-Injlis	4	4	3	2	13
al-Ma‘lumat					
al-‘Amah	3	2	1	-	6
al-Imla’	2	1	1	-	4
al-Mantiq	-	2	2	2	6
al-Balaghah	-	2	2	2	6
al-‘Arud wa al-Qawafi	-	-	2	-	2
‘Usul al-Fiqh	-	-	1	-	1
al-Mustalahat	-	-	-	1	1
Tariq at-Tadris	-	-	-	1	1
Total	39	39	39	39	156

Source: Ali Abubakar, 1972 pp. 522 to 528

There are not less than 20 subjects in the table. They replace the nine subjects of the 1934 curriculum, though about twelve

of the new subjects were regular, i.e. taught in each of the four years. *Fiqh* was given preference with eight periods per week throughout the four-year course – about 44 per cent of its allocation in the 1934 programme.

Comparing the Law programmes of the Nigerian universities offering *Shari'ah* (either distinctly or comparatively) with those of other universities which do not offer it, we observe that the former set of universities omitted nothing among the core courses of the Common Law. However, no university programme requires a student to earn less than 120 Units/Credits in a four-year Law course, though the Curriculum of the Common Law biased faculties also allow for quite a number of such Units/Credits to be earned in non-law but related areas.¹⁶⁹ Yet, with that provision, more than 90 Units/Credits would be earned in the Common Law. With the Curriculum of each of the *Shari'ah* biased faculties offering approximately 60 Units/Credits of the Common Law courses which we have observed above that should be reduced to about 50 Units/Credits, it presupposes that

Table XXVII: Textbooks of Selected *Shari'ah* Subjects in the 1954 Higher Muslim Studies Section of Kano School of Arabic Studies

الكتب المقررة				
الصف الرابع	الصف الثالث	الصف الثاني	الصف الأول	ملاحظات
جواهر الإكليل الجزء الثاني من باب البيوع إلى الشهادة	جواهر الإكليل على مختصر خليل من باب النكاح إلى آخر الجزء الأول	كفاية الطالب العدوي — الجزء الثاني من باب النكاح إلى باب الفرائض	القمر الداني من أول الكتاب إلى باب النكاح	
تتوير الحوائك من الحج إلى آخر الجزء الأول	تتوير الحوائك من العمل في جمع الصلاة إلى الحج	تتوير الحوائك على الموطأ: من أول الكتاب إلى العمل في جمع الصلاة	الأربعون النووية مع شرح النووي	
الجلالين من لقد رضى الله، من سورة الفتح إلى آخر سورة الحديد	الجلالين جزء قد سمع الله	الجلالين جزء تبارك كله	الجلالين جميع جزء عم	
—	الورقات مع شرح الجلالين: الكتاب كله	—	—	أصول فقه
شرح الزرقاني على البيقونة	—	—	—	المصطلحات

Source: Ali Abubakar, 1972:52–528

the students of such universities are either deficient in Common Law knowledge as compared to the students of Common Law

biased faculties, or overtasked by compressing an equivalent of 90 credits to only 60 credits in addition to *Shari'ah* law courses.

A similar argument is hereby adduced for the *Shari'ah* courses. According to the Catalogue of King Abdul Azeez University for 1399/1400 AH – 1979/1980 CE, a student of *Shari'ah* Law must earn 14 Credits – University Requirement, 12 Credits – Faculty Requirement, and 110 Credits – *Shari'ah* Department Requirement, totalling 136 Credits in four years.¹⁷⁰ Now that *Shari'ah* Law specialists in Nigerian universities are required to earn approximately 50 Credits in a four-year programme, about half of what their counterparts in King Abdul Azeez University must earn, it presupposes that the former is either deficient in the depth of *Shari'ah* knowledge as compared to the latter or that the former is being overtasked through the compression of 110 Credit courses into only about 50 Credits. A similar result will be obtained when the *Shari'ah* curriculum of any Nigerian university is compared to its counterpart in al-Azhar, Cairo. Elements of *Shari'ah* in the programme of the Faculty of Arabic and Islamic Studies which is taught only as an integral part of a degree in Islamic Studies is of a high standard which compares favourably with the *Shari'ah* curriculum in the Nigerian universities. Meanwhile, we round off our discussion on the training of personnel for Nigerian courts of *Shari'ah* jurisdiction with the following problems associated with the teaching of *Shari'ah* law in the Institutions offering it.

5.4.3 Teaching Problems

In any educational set-up, the objective and purpose of establishment often determines the approach and teaching methodology. Legal education (whether Islamic or otherwise) is no exception from this general rule of life. As regards Islamic Legal Education, many seminars and conferences had been held in Europe and the Middle East to determine its position among other legal systems of the world.¹⁷¹ The question was raised as to whether its teaching should be independent or combined and integrated with European laws. There were, as there still are, supporters of each approach among the *Shari'ah* academics all over the world.¹⁷² It was discovered eventually that the objective of teaching only the 'rules' and the 'authorities' of the *Shari'ah* and not the legal context in which the law developed had failed to produce judges and jurists who could apply *Shari'ah* law to solve contemporary problems.

The above general observations on the *Shari'ah* legal education is quite relevant to Nigeria where the application of Islamic law is limited in scope and territory, in addition to the hostile environment in which it operates in recent times. Undoubtedly,

the psychological effects of regarding *Shari'ah* law as 'native law and custom' on the one hand, and 'a foreign and received law' on the other hand, by many non-Muslims and a few politically biased Muslims occupying influential seats in government circles, could create nothing but confusion, not only in the minds of the Muslims who practise it in courts but also in developing a progressive curriculum for its teaching in the country by *Shari'ah* law teachers. Such a confusion is further aggravated by non-availability of Maliki School legal manuals in English and the deficiency of the majority of Nigerian university students of the *Shari'ah* in the mastery of Arabic language which is the language of the primary sources of *Shari'ah* law.

There are four main objectives of university education:

- i. acquisition of skill,
- ii. development of mind,
- iii. advancement of learning, and
- iv. response to social needs.

The first three seem theoretically personal to the student while the fourth is practically relevant to the society in which the student lives. As a UNESCO Seminar of 1952 has identified 'practical skill of the legal profession and the understanding of the legal system'¹⁷³ as the objectives of teaching law without making any reference to 'response to social needs' – Prof. R.W. James has observed that:

a sound system of legal education, properly perceived and utilised, had important contributions to make to society. Conversely, a bad system of legal education may have at best negative, at worst, disastrous consequences.¹⁷⁴

Faculties of law offering *Shari'ah* courses in Nigerian universities have equally identified the importance of social needs in relation to the courses they offer. The Law curriculum of Bayero University recognises the practice of both Common and Islamic laws in Nigeria and the designers do not fail to mention that 'the objective is to produce a lawyer who is well grounded in Common law and Islamic law and who is capable of practising both'.¹⁷⁵ Similarly, the programme of the University of Sokoto in Law contains a statement that the aim is to produce lawyers who would be knowledgeable in both Common and Islamic laws and who would be useful in a society where both the two systems play 'equally important roles'. The importance and relation of law to the society cannot be over-emphasized.

The universities cannot unilaterally achieve the aim of making law relevant to the society without the assistance of the Law School, since they 'can at best attempt to train generalists, not specialists'¹⁷⁶ whereas the professional training

is at the Law School. It is worthy of note that the Legal Education Act (No.12) 1962 had separated the vocational (professional) aspect of legal education from the university education thereby limiting the designed programmes of the universities to only theoretical and formal courses which only complement the vocational objectives. The Law curriculum of every Nigerian university must therefore include all Common Law core courses available in the Law School from which students graduate as qualified lawyers or legal practitioners. As such, the universities are not training, in effect, scholars with a broader vision of law as an instrument of social control but legal functionaries who see themselves as 'professionals' *per se*. However, the realisation of social needs and values had forced some universities to design programmes relevant to the society even if its impact will be felt only by the few elites and not the general masses.

In view of the fact that the universities train only 'generalists' in law and the Nigerian Law School makes the students 'professionals'; and whereas the curriculum of the school covers only Common Law courses, the legality of any Nigerian lawyer claiming to be a professional in *Shari'ah* law can be aptly challenged. Hence, the dire need for a *Shari'ah* School of Advocates as earlier recommended by the 1976 Area Courts Reform Committee. The necessity of the establishment of such a school lies in the fact that the objective of *Shari'ah* legal education is wider than that of the Common Law. It is theologically connected, spiritually inspired, and socially oriented. Thus, the integration of *Shari'ah* law in the Common law courses at the Law School will not solve the problem; rather, the establishment of a division or an independent *Shari'ah* Law School (of Advocates) is the only answer.

The institutions training *Shari'ah* law personnel face the problem of approach in teaching. Such problems arise from the status and qualification of the personnel they train. At present, the institutions offer degree courses in *Shari'ah* law, Diploma courses in the same, and a variety of Basic Judicial courses. Students' admission for each of the three basic courses vary in background knowledge and experience in *Shari'ah* legal practice. They also possess variant degrees of knowledge in Arabic language, which is a prerequisite for *Shari'ah* courses and English language which is also a prerequisite for practical purposes, at least for the time being in present Nigeria. In fact, many Nigerian *Shari'ah* law graduates possess inadequate knowledge of Arabic language, hence their inability to appreciate the salient points raised in *Shari'ah* legal manuals. Such products

will undoubtedly opt for the practice of Common Law instead of the *Shari'ah* in which they claim to be specialists.

Shari'ah law lecturers face the problem of methodology in teaching their courses in Nigerian universities. Three options are available: (a) Common Law methods, (b) Islamic traditional methods, and (c) Comparative method. Each has its merits and demerits in relation to the students' background and experience. The old system of memorising the content of legal manuals may not be suitable in this modern age because in the past, the legal manuals were few and tersely written to facilitate memorisation, while at present, many commentaries and glossaries of such early works are available in print with diversified opinions. Similarly, to embark on comparative system of teaching is tantamount to overlabouring the students who will end up obtaining a single degree instead of double. The Common Law method may not be suitable because Islamic law had been reduced to a mere customary law thereby depriving it the facilities open to the English law and consequently making it short of necessary ingredients for that method.

Modern methods of lecture and note-taking, case analysis, and seminar may be considered; yet each should be confined to a category of students. Case-method may be considered appropriate for students on Basic and Advanced Judicial courses, lecture and note-taking for the undergraduates of the universities, seminars for the postgraduate students and a combination of case-method and lecture/note-taking for the Diploma students. We however have reservations for the validity and usefulness of Diploma courses in *Shari'ah* other than serving a preparatory role for admission into the universities on the one hand and making its holders serve in the rural areas on the other hand. If Magistrates are degree holders in law, efforts should be made to make Area Court judges degree holders as well. Each of the three 'modern' methods of teaching *Shari'ah* legal education has its peculiar problems. For example, the reported Islamic cases are very few, thereby militating against the success of case-method; and such few reported cases are not detailed enough. Similarly, the available legal manuals in English on Maliki doctrines are scanty — a problem for the undergraduates majoring in *Shari'ah* law. A catalogue of problems of *Shari'ah* legal education was made by M.K. Masud in a paper presented at the workshop on 'The Teaching of Islamic Law in Nigeria' at the Faculty of Law, University of Sokoto in June 1983.

Meanwhile, we feel that the Area Court judges should be exposed to equal training with the Magistrates as suggested by Hajia Fati Yusuf Imam.¹⁷⁷ Not only that, the personnel of the *Shari'ah* Court of Appeal should neither be people who are

specialists in Arabic, who only did some *Shari'ah* courses at subsidiary level, nor general Islamists whose knowledge of the *Shari'ah* in its entirety may not be adequate. Similarly, university graduates with specialisation in the *Shari'ah* but with shallow knowledge of Arabic are not desirable for *Shari'ah* or Area Courts in which *Shari'ah* law is administered; just as lack of depth of *Shari'ah* knowledge as evidenced in the present curriculum of Nigerian universities training *Shari'ah* personnel is detestable.

Shari'ah School of Advocates should be established without delay. Quite a number of qualified *Shari'ah* personnel to go through the school are available, though they were trained in private institutions of learning. Indeed, the integration of *Shari'ah* law and Common Law in one another, as practised at present, is undesirable. The havoc in the system is glaring from the cases decided at the (Federal) Court of Appeal as analysed in Chapter Four *passim*. What Nigeria needs at present are competent and qualified lawyers and legal practitioners of both the Common Law and Islamic Law who are well trained in their respective laws. Whoever may wish to combine both systems in knowledge should either go through each separately in sequence or sandwich programmes be made available in each, in which a graduate of either can complementarily go through the sandwich programme of the other. Indeed, the role law can play in fashioning the society cannot be over-emphasized and a sound legal education is the tool for a sound legal system which can pilot a nation to prosperity rather than doom.

5.5 *Shari'ah* Law and the Nigerian Society

Nigeria is a country of diverse cultures as discussed in Chapter One of this work. Its social approach to issues is thus bound to be equally multifarious. The adherence of the populace to, and their beliefs in, different political and religious ideologies, coupled with their level of civilisation, contribute in no small measure to the determination of progress and prospect of the nation. The economic system adopted by the government and the environmental upbringing of the individual citizens as well as their orientation are equally important in the determination of the prevalence of peace in the domain. We discuss in this section, the Nigerian society within the context of peace, which is the bedrock of progress, with the view to determine how peace has been or can be achieved through the existing legal framework; for without peace, hardly can there be progress.

The crime rate in the present Nigeria is alarming. Armed robbery, embezzlement of funds and many allied crimes are committed by not only some people outside the service of the government but also some public servants and, most

astonishingly, some members of the law enforcement agencies. For instance, an armed forces personnel was reported to have led a team of armed robbers from Lagos for an operation in Ondo State.¹⁷⁸ This indicates that the Nigeria Police Force may not be able to deal with some criminals, since an Army officer committing a crime may have his way through a threat to a non-commissioned officer of the police. In fact, the inability of the Police Force to cope with the present crime wave in the country is an open secret.

Failure of the present legal system in Nigeria has been the subject of discussion by, not only the teeming masses but, the legal luminaries in both the private and the public services. According to Samson Ike Oli:

The present administration in Nigeria, despite its avowed commitment to law enforcement, has not demonstrated sufficient appreciation for urgent concerted move to improve its criminal justice system. The lower and most viable cadre of the systems personnel continue to look shabby. Buildings and equipment of criminal justice agencies are still in a state of neglect. Judges, magistrates, senior police and correctional officials continue to be relegated to inferior social statuses, especially at official functions.¹⁷⁹

In his own contribution in this regard, Justice Ayo Irikefe, a retired Chief Justice of Nigeria, exonerated Nigerian judges from the present predicament of Nigerian judiciary. In a paper entitled 'Judiciary: Has it been a saint or sinner', he opined that:

It is no part of the functions of a judge to carry out an investigation or examination on behalf of society at large... a Nigerian judge has a duty under the terms of his judicial oath to act only on the evidence placed before him. If it is the wish hereafter of the nation that this procedure is inadequate or defective, then a fundamental issue would have arisen and after throwing the issue open to public debate, the procedure best suited to our needs would have to be written into our laws.¹⁸⁰

These revelations have indicated the major causes of congestion and delay in Nigerian courts. Other contributions include the attitude of legal practitioners who charge their clients exorbitantly and handle more cases than they can cope with, resulting in incessant requests for adjournments. Additionally, the laws are defective, as observed above by Justice Irikefe. Public statements were made by the Attorney-General of the Federation, Prince Bola Ajibola, that the 1979 Constitution of the Federal Republic of Nigeria would be 'totally reviewed'¹⁸¹ and as a prelude to that, all the pre-1900 laws of the British operative in Nigeria till the present time like 'the Official Secrets Act... and the Family

Law which is archaic and of no bearing to present day realities' have been recommended for abrogation.¹⁸² The judicial officers we interviewed expressed their abhorrence of English Law in Nigeria.¹⁸³ There is therefore a need for review; and such was said to be in progress as revealed by Prince Bola Ajibola who alleged that for a start, the Federal and State High Courts would start operating a uniform legal system and procedure from September 1987.¹⁸⁴

Another major cause of the crisis and tension in the Nigerian judiciary was the agitation for more cases by some courts which seemingly led to injustice in the administration of justice as discussed in the various sections above. Worse still, the prisons were congested and very few ones were built to arrest the situation. Indeed, this section examines quite a number of issues relating to the Nigerian legal system, particularly the penal aspect, with a view to determine the extent to which *Shari'ah* law can serve as a better alternative to the present system. It finally discusses the religious tension in the country and how such can affect the operation of *Shari'ah* law either positively or negatively as is now happening in India,¹⁸⁵ which was a mentor of Nigeria in the Penal Codes via the Republic of the Sudan.

5.5.1 Rate of Crime and the Present Legal System

Criminal activities in the country cover murder, manslaughter, suicide, assault, rape, abortion, forgery, robbery and a host of others relating to traffic, tax defaulting, etc. Criminals have no regard for any rule or law as they can carry out their acts anywhere. Robbers extend their raids to courts to steal exhibits¹⁸⁶ as they attack police officers and traditional rulers. The following table shows the crime rate in Nigeria between 1940 and 1962, according to the records of the Nigeria Police Force:

Table XXVIII: Statistics of the Total Figures for True Cases of All Offences (Including Native Administrations) Recorded by the Nigeria Police Force: 1940-1962

A 1940-1949		B 1950-1956		C 1956-1962	
1940	73,617	1950	104,554	1956	159,335
1941	80,804	1951	114,651	1957	182,718
1942	76,083	1952	117,755	1958	112,794
1943	83,893	1953	128,673	1959	137,050
1944	74,532	1954	106,126	1960	106,165
1945	76,123	1955	183,670	1961	110,019
1946	66,824	1956	157,648	1962	118,475
1947	68,033				
1948	72,734				
1949	91,544				

Source: 1. Annual Report of the Police Department for the Year 1950-51. Lagos: Government Printer, 1952. Appendix E

2. Annual Report of the Nigeria Police Force for the Year 1954-55. Lagos: Government Printer, 1956. Appendix J

3. General Report and Survey on the Nigeria Police Force for the Year 1962. Lagos: Federal Ministry of Information, Printing Division, 1964. Appendix C.

NB: 1. In section 'B', the figure for 1950 covered the period between January 1950 and March 1951 while all other years covered April of the year to March of the following year.

2. As for 1956 in section 'C', the period covered January to December as in subsequent years till 1962.

Figures in the table fluctuate between 66,824 crimes in 1946 and 183,670 in 1955. The period covered by the table was when the Police Force could be said to be most effective, for there was no discrimination in investigating reported cases by either the rich or the poor, the influential or the non-influential people. At present, quite a number of crimes are committed without the knowledge of the police, due partly to lack of confidence of the public in the force. A top police officer confirmed the above statement and added that a highly placed person can merely phone the Commissioner of Police in a State, reporting a crime committed in his residence, and get it investigated immediately; while the house of a non-influential citizen may be burnt by his enemies without any concrete action from the law enforcement agents 'because he is poor'! Taking the highest crime figure of 183,670 in 1955 to find the average per State and Abuja (the Federal Capital Territory of the 19- State politico-geographical arrangements), each State would have had an average of about 9,000 crimes for the year. At present, criminal cases tried in the courts of some States believed to be having returns of minimum rate of crimes reveal higher figures than 9,000. For instance, Kano State recorded 10,228 criminal cases in only the Area Courts in 1979 and 10,761 in 1980, not to talk of those tried in the Magistrates and the High Courts or those reported to the Police but did not get to court.¹⁸⁷ The crime rate needs to be curtailed, though it is a difficult task. Bendel State used to top the list in the annual returns of the Police on crime rate in recent years.¹⁸⁸

From interviews, we became convinced that 'imprisonment' as penalty as well as 'execution for some offences' contributed their respective quotas to the increase in crime wave. The prisons are congested and hardly are there additional new

prisons to the 111 discussed in Chapter Two. 'In 1985, the then Minister of Internal Affairs, Major General M. Magoro, revealed that there were over 50,000 inmates in our prisons, almost double the number the prisons can accommodate'. It was therefore suggested that delays in the trial procedure be reduced in order to solve this problem of prison congestion, rather than building additional prisons or expanding the existing ones.¹⁹⁰ Many Nigerian newspapers have commented on the insecurity of the Nigerian prisons. For example, *The Punch* in its editorial comment of 20/5/1987 observed that 'with criminality in the country already at pitch levels, the least we can afford now is insecurity of prisons.'¹⁹¹ The opportunity for commenting on the state of Nigerian Prisons came to the Nigerian press and the individuals through the death of about twenty prisoners in May 1987 at a riot between the inmates and the prison warders in Benin Prison. The current situation is different. Southern states of Nigeria are now leading in criminal activities, especially kidnapping and armed robbery (Editor).

An anonymous top official of the Nigerian Prisons Authority explained to us during an interview that causes of ineffectiveness of the prisons to reform prisoners could be attributed to lack of sufficient accommodation for the inmates who ought to have been duly separated according to the gravity of their offence. At present, major and minor offenders like 'hemp addicts and ordinary thieves' or 'frequently committed offenders and first offenders' are put together indiscriminately in the prisons and such makes reform difficult. We believe that imprisonment is not the best penalty for crimes as it requires budgetary allocation from the government through the payment of salaries for warders – from the lowest to the highest cadre – and feeding, as well as housing the inmates, all of which yield no revenue to the coffers of the government.

Indiscriminate execution of criminals of the highest order has equally been observed to be inadequate to curb the rate of crime in Nigeria. Mr Benjamin Iserhien had once pleaded for pardon on behalf of Lawrence Anini, a notorious armed robber, while the editorial comment of the *New Nigerian* newspaper of 27/1/1987 also called for an end to public execution. In addition to that, a meeting of the Attorneys-General of Northern States had discussed the topic of public execution of robbers at a meeting in Minna, Niger State, while Dr Akinola Aguda (the Director of the Nigerian Institute of Advanced Legal Studies) had equally viewed execution as a brutal phenomenon in the society. All these revelations were made by Shuaibu Umar in an article entitled 'Execution: Barbarity or Correction' published

in the *New Nigerian* of 25/4/1987. Shuaibu Umar discussed that many countries of the world had banned execution – between 1870 (Netherlands) and 1981 (France) – and how overdose of lethal injection had been discovered as alternative by the United States of America, particularly in Texas.¹⁹² In contrast, the views of some selected religious ministers among the Muslims and the Christians, a criminologist and a psychiatrist, which Bayo Osagbemi sought and reported on pages 8 and 9 of the *Sunday Herald* of 31/3/1986, revealed support for public execution of robbers, at least for the time being in Nigeria.

The editorial opinion of the *Daily Times* newspaper of 25/4/1987 has identified the major cause of prison congestion in Nigeria to be primarily ‘a faulty legal system’. According to the paper, ‘cases are tried and disposed of by the courts at snail’s speed whereas suspects are clamped into detention at jet speed’. It called on the government to find:

the root causes of why the bench and the police force have continued to fail to attract more hands and competent officers into their services. Poor remuneration and unattractive working conditions, generally, are central to the problem.¹⁹³

While Shuaibu Umar identified the major causes of crime to be prostitution, starvation, poverty, unemployment, corruption and some other vices, Col. David Mark, a one-time Governor of Niger State, held the belief that in executing the armed robbers, bullets should be aimed at different parts of the body so that they (robbers) would ‘meet their death in lingering and painful manner’.¹⁹⁴ If the view of Col. Mark in this regard can be deeply considered, it lends support for Islamic principle of penalty in a way; for in Islam ‘tumult is worse than killing’.¹⁹⁵ But the philosophy of Islamic principle is to retain the criminal in life and torture him to realise the gravity of his offences and to serve as deterrent to others, but not to be tortured at the point of death.

The efficacy of Islamic penal law to arrest the rate of crime in Nigeria cannot be over-emphasized. For instance, the recent reported self-confessions by some armed robbers to some religious ministers¹⁹⁶ would not go unpunished under the operations of an Islamic State. Indeed, the primary goal of Islamic law is the creation of peace in the society while its penal law is geared towards reforming criminals and encouraging collective responsibility by which the masses are mobilised to check the excesses of their kith and kin. The penalties are awarded in such a way that they would serve as

deterrent to others. Further still, where payment of blood-wit is awarded and the criminal is poor, it devolves upon his kins to rally round him and assist in raising fund for the payment.¹⁹⁷ By so doing, if a member of a family is behaving towards committing crime, other members shall caution him, since the consequences of leaving him alone may not be solely borne by him but by all of them. And where he feels wealthy enough to pay for the blood-wit, the name of the family which will be eventually tarnished shall force other members of the family to put a stop to that criminal act. Should he commit the offence in spite of the intervention of the members of the family, he may end up executed as deterrent to others through the exercise of *Ta'zir*.

Payment of *Diyah* (blood-wit) as specified by the Prophet Muhammad (PBOH) should be by camels (100 heads), gold (1,000 Dinar), silver (10,000-12,000 Dirham), cattle (200 heads), garment (200 pieces), or sheep (2,000 heads).¹⁹⁸ Similar details are contained in the 211 sections of 'Islamic Penal Codes of Iran (Diyat Section) of December 1982'.¹⁹⁹ The payment of ₦7,400 as damages by the Oyo State government to the family of one Nasiru Bello, who was executed prematurely for armed robbery while his appeal was pending in a superior court,²⁰⁰ is partially Islamic though the law applied was common law. If it were to be paid under the principles of Islamic law of *Diyah* as analysed above, the family of Nasiru Bello would have received roughly ₦100,000 (One hundred thousand naira); for if measured by the sheep, the minimum cost of one quantified to be ₦50.00 will be multiplied by 2,000 heads or ₦500 cost of a cow multiplied by 200 heads. If the government cannot afford the payment of such a heavy amount, it will not hastily execute people whose appeals are pending in court.²⁰¹

Should an individual be requested to pay a *Diyah* of ₦100,000, he will surely labour much to raise it except if he is very wealthy. Hence, the efficacy of Islamic penal law. Alhaji Haliru Binji has compared the Islamic penal offences with the penal code in a paper delivered at the Culture Seminar of the Faculty of Law, Ahmadu Bello University, Zaria, on 15/4/77. His views are compressed in the following table.

Table XXIX: A Comparative Analysis of Islamic Criminal Offences and the Penal Code Offences with Relevant References

Penal Code Offences	Penal Code Law Reference	Qur'anic and Hadith References	Equivalent Islamic Criminal Offences
Murder Culpable Homicide	ss. 220&221	Qur'an 5:45	<i>al-Qatl al-amd</i>
Robbery	ss. 296&298	Qur'an 5:33	<i>al-Hirabah</i>
Adultery & Sodomy	ss. 387&388 + s. 284	Qur'an 24:2+ <i>Hadith</i>	<i>Az-Zina & Liwat</i>
Treason	ss.410&411	Qur'an 49:9	<i>al-Baghy</i>
Theft	s.286	Qur'an 5:38	<i>as-Sirqah</i>
Defamation	ss. 391&392	Qur'an 24:4	<i>al-Qadhf</i>
Drinking Alcohol	s.403	Qur'an 5:90& 91 + <i>Hadith</i>	<i>Shurb al-Khamr</i>
Hurts	ss.240&241	Qur'an 5:45	<i>Juruh</i>
Apostasy	silent	Qur'an 2:217	<i>ar-Riddah</i>

In an Islamic State, many other 'modern' offences can be penalised through the *Ta'zir*, applying any of the penalties for the ten listed offences in the above table as yardstick. In this regard the Iranian *Hudud* and *Qlasas* Act contains not less than 218 sections.²⁰² The adverse effects of scrapping Islamic Penal Law and its replacement with the Penal Codes as recommended by Abu Rannat Committee (1958) for (at least) Northern States of Nigeria and the government's unfortunate remark in accepting the report – as discussed in Chapter Two – must have been informed by the foregoing.

5.5.2 Defects of the English Legal System as Applied in Nigeria

The English law system has been discovered to be unsuitable for application in African countries – including Nigeria. Lord Denning of the British House of Lords attested to this discovery when he confessed that the technicalities of the Common Law make it sophisticated.²⁰³ Yet the same law has been regarded the only yardstick with which the validity of all other laws operating in Nigeria are measured.²⁰⁴ Eminent jurists of the Common Law have realised the defects of the English law system, still they continue to promote it. This led to the comment of Olumide Fayomi, a legal practitioner, on the unfortunate 'dereliction of duty' by a retired Chief Justice of the Federation, Justice Sowemimo, as reported in the *Nigerian Tribune* of 24 August 1985. Reviewing the events that happened in Nigeria

in 1985, the *National Concord* quoted Olumide Fayomi in the said *Tribune* as follows:

The renouncement (sic) statement of the ills of the judiciary credited to (Chief) Justice Sowemimo exposes him to the criticism of dereliction of duty because he had lived with the problems all through his days without raising a loud voice against them.²⁰⁵

Similarly, the accusation of nonchalant attitude to work, levelled against the judicial officers in Borno State by the Governor of the State in early 1986 can therefore be justified, though Justice Muhammad Kolo, the Chief Judge of the State, defended his judiciary that the number of judges in the State High Court was five, in contrast to more than thirty judges in Lagos, and concluded that 'the statistics of the cases disposed by the courts clearly vindicate the judges'.²⁰⁶ That defence notwithstanding, the failure of the English law system in Nigeria is too glaring to require public comments. The editorial opinion of the *New Nigerian* of Monday, 1 April 1985 highlighted the causes for reform in the Nigerian Judiciary, claiming that the 'judiciary asked for' the recent purge of its staff,²⁰⁷ while a similar editorial of the *National Concord* of Saturday, 13 April 1985 entitled 'Judicial Reforms' revealed that 'the number of "cases"... pending in our high courts alone, was recently put at 1.5 million'.²⁰⁸

The technicalities of the English system of law are undoubtedly the major causes of its unsuitability for Nigeria. It has led to court congestion with cases, and prison congestion with convicts and accused people. The Body of Benchers which submitted its report on the court congestion to President Ibrahim Babangida, 'disclosed that a total of 340,000 cases have been pending in our courts since 1984', attributing the reasons for the delay to 'the appointment of native judges and magistrates to various commissions of inquiry, lack of court infrastructure, inadequate supporting staff, unready or uncompleted police investigations as well as indolence of judges and magistrates'.²⁰⁹ Indeed, delay of justice has caused congestion of prisons where many innocent citizens had either overstayed the term they could have served if convicted or died innocently like one Karima Lawal 'who died in an Ilorin prison after spending three years without trial for a simple offence of cheating'.²¹⁰

Judicial officers of the English system have realised the evil of the technicalities in the Nigerian courts. Justice U. A. Kalgo²¹¹ opined that the courts should do away with the technicalities, an identical view with Mrs Z.Y. Aliyu²¹² who similarly kicked against the present practice of police prosecuting in courts.

According to her, the preliminary investigations by the police often took a long time, whereas some or many of the police prosecutors were not properly trained in law. Coupled with all that is the frequent transfer of prosecutors to other States by the Police Command when their cases were either nearing completion or half-way. Justice K.M. Kolo also shared similar views with Mrs Z.Y. Aliyu on replacing police prosecutors with well-trained lawyers from the State Ministries of Justice.²¹³ He suggested the establishment or retention of a Justice Committee comprising the Chief Judge, the Grand Kadi, the Commissioner of Police, the Attorney-General, and the Controller of Prisons in a State to meet from time to time on how to decongest the Courts and the Prisons.²¹⁴

If a State Chief Judge can control his officers in a bid to decongest the courts, it is doubtful if he can extend such to the private legal practitioners who often call for adjournment of cases which inadvertently result to delay and congestion of cases in courts.²¹⁵ Justice K.M. Kolo added 'unnecessary interlocutory applications and unnecessary legal technicalities' to unnecessary adjournments as means by which lawyers cause delay of cases in courts. He concludingly advised the lawyers:

If you cannot cope with the volume of cases coming to your Chambers, I very strongly advise you to employ or take in more legal hands into your chambers to assist you in handling the cases.²¹⁴

Another dimension to the problem is the acceptance of some lawyers to defend accused persons for offences glaringly committed, like theft for instance, when everybody is convinced that the accused actually stole the property. Invariably, the lawyer may succeed in proving the innocence of such an accused person through legal technicalities.²¹⁷

Expensiveness of the English system of law has also been attributed to the practising lawyers. Justice U.A. Kalgo observed that the lawyers charge their clients too exorbitant amounts.²¹⁸ Many other justices shared that view with Justice Kalgo; for instance, Chief Judges of Anambra, Borno, and Kwara States had on different occasions made similar remarks to the extent that Justice K. M. Kolo was castigated by the legal practitioners of his state.²¹⁹ The excesses of these lawyers are known, not only to the poor masses, but also to the government functionaries including the President of the Federal Republic of Nigeria who had urged the new Chief Justice of Nigeria on the occasion of his swearing-in to 'look into the problems of expensive litigation'²²⁰. Justice Kolo lamented that 'the court

fees are just chicken feeds or token fees while the legal fees are generally exploitative in nature’.

As the eminent jurists have adequately uncovered the atrocity of Nigerian lawyers on the delay of justice in the court, we too can observe a similar contribution of the very judicial officers, particularly the administrators among them, to the problem. In spite of the undesirability of the English system of law in the country, the administrators continued to pave way for concentration of cases in Magistrates’ and High Courts. Justice K.M. Kolo confessed²²¹ that the Area Courts were being gradually divested of criminal jurisdiction in favour of the Magistrate Courts. He added that plans had been completed, as in other states, to decentralise the state judiciary by posting resident High Court judges to the headquarters of the Local Government Areas, and that as at the end of 1985, two of such judges had reported at their respective stations in Borno State.

For the Nigerian judiciary to be truly Nigerian, many reforms are necessary – including modifications and amendments to the Constitution and the Laws of the Federation and of the States.²²² For instance, the laws have not taken care of the predicament of Justice Kalu Anya (during the Second Republic between 1979-1983) which re-echoed in another way in the case of Justice Abubakar Alkali Abba in 1987.²²³ In either of the two cases, the learned justice was faced with the problem of territorial jurisdiction, hence the predicament of where to ‘take his case without looking like an accused, prosecutor and judge rolled into one’. However, the ‘archaic laws’ are on their way out and not less than ‘22 subjects of law are being examined’ at various workshops organised by the Nigerian Law Reform Commission²²⁴ while Decrees are expected to be promulgated thereafter. Drafts of such decrees ‘are in the pipeline’ according to the revelation of the present Minister of Justice and Attorney-General.²²⁵ We only hope that such reforms will cover elements inhibiting the retrial of a case returned to an Upper Area Court in Ilorin since 1972 as well as many of such cases, lying in the various courts throughout the Federation.²²⁶

Justice K.M. Kolo did not see the need for the establishment of Federal High Courts. He opined that the state judiciary could be expanded and more judges appointed to cater for the jurisdiction of Federal High Courts.²²⁷ Similarly, we see no need for the setting up of the several adhoc tribunals now operating in the country. Their existence is not only a mockery of the English oriented courts but a vindication of the failure of the system. Courts apply diversified laws while judges possess divergent qualifications with different orientations.

Implications of all these are nothing but confusion to the administrators and practitioners of the laws.

It is apparent from the foregoing that law and morality have been separated in the present Nigerian legal system, whereas both are interlaced.²²⁸ The courts have not been able to marry the two together as evidenced by a Supreme Court case in which some students disciplined by the authorities of the University of Maiduguri were victorious with the Court's decision.²²⁹ Neither could the police see the area of agreement between law and morality. For instance, some pilgrims who returned from the Holy Land to Kano International Airport but who had no Nigerian currency with which to settle some bills and had to resort to selling some of their materials brought from *Haji* were arrested by the police on the ground that they were selling contraband materials.²³⁰ Indeed, it is when the laws are framed with the intent to promote morality, that the crime rate will reduce in Nigeria. Justice M.A. Ambali has equally traced the evil of the capitalistic economic system which besieges Nigeria partially to some faulty laws operating in the country.²³¹

Law should not be too flexible due to diversionary human nature. It should also be neither too harsh nor too lenient. If law should follow the dictates of the society in all cases, it will become too compromising. For instance, when Edict No. 5 of 1969 was promulgated in the defunct Eastern State with twenty-one years imprisonment for stealing 'even a fowl',²³² it was hailed by the populace because livestock theft was rampant; but in no time, the same masses started agitation for its abrogation.²³³ Should the government consider such agitating, stealing of animals could have resumed, yet twenty-one years imprisonment is too high for such an offence – without qualification.

Here lies the efficacy of Islamic penal law which has been divinely determined with the promotion of morals as its background. It is rigid in the circumstance in order to make some criminals serve as deterrents to others. The same argument could go for the twenty-one years imprisonment, but as we have discussed earlier, how moralistic would it be for the government to feed and house a convict for such a high number of years, for a mere theft of a fowl costing about ₦15.00 (Fifteen naira only) whereas if Islamic penalty were to be applied, such convict would become a liability, not only to the government but also to his family, with the psychological effects of that as earlier discussed. In realisation of the defects in the English oriented laws, Alhaji Sule Baba Mohammed has recently suggested the recommendation of stiffer punishment for receivers of stolen goods.²³⁴ Such a suggestion from a

Commissioner of Police should not be taken lightly. Many people actually hide under the Fundamental Human Right gesture of the government to commit crimes and get away with them through manipulations of the law.²³⁵

The efficacy of Islamic penal law was not doubted by some non-Muslims who came across it one way or another. At a seminar held in 1979 at the Institute of Advanced Legal Studies, University of Lagos, a non-Muslim female participant from the Chambers of the Attorney-General of Cross River State was so pleased with the law of succession under the *Shari'ah* that she expressed the view that the *Shari'ah* law of succession has given women their right of succession more than any other law,²³⁶ while another (non-Muslim male) who was a High Court Judge commented that:

if *Shari'ah* (Islamic Law) was really understood by people in this country, the rumpus about *Shari'ah* which greeted the Constituent Assembly debates would not have taken up [sic] the ground.²³⁷

Furthermore, Justice M.A. Ambali has quoted J.N.D. Anderson who revealed in his book, *Islamic Law in Africa*, that '... pagans seem sometimes to prefer the *Alkalai* as trained and unprejudiced jurists, and that the latter, particularly in predominantly pagan areas, often prove remarkably broad-minded and willingly apply pagan laws and custom with the aid of pagan assessors'.²³⁸

Defects of the English law system in Nigerian society as proved by the foregoing call for an alternative, and this we find in the Islamic law system. The testimony of the Muslims (Jurists and laymen), the non-Muslims (practitioners in Nigeria and elsewhere) and the efficacy of the penal system, all in respect of *Shari'ah* legal system point to its suitability for both civil and criminal cases in Nigeria. However, the non-Muslims may be exempted from *Shari'ah* jurisdiction if they so wish; but if they opt for it as the pagans opted for it according to the revelation of Anderson quoted above, the law is accommodating enough to treat them justly. Muslim foreigners should however be subjected to Nigerian *Shari'ah* courts' jurisdiction. For example, a recent report indicated that a Pakistani was beheaded in the Kingdom of Saudi Arabia for killing another Pakistani with an iron pipe after a quarrel.²³⁹

5.5.3 Distribution of Courts by Population Statistics and Religious Adherence

In 1931, there were 18 courts for a population of 198,000 people of Lagos, an average of one court to 11,000 people; whereas the 1977 Customary Courts Reform Committee had suggested

the establishment of one court for 50,000 people, a recommendation rejected by the government. Using the 1963 census figure for the nineteen states²⁴⁰, the following table shows the average number of courts each state could have established based on either 50,000 or 10,000 people per court.

Table XXX: Projected Number of Courts Per State, Based on Ratio 1:10,000 and 1:50,000 Using 1963 Census Figures

State	Population (1963 Census)	No. of Court 1:10,000	No. of Court 1:50,000
Anambra	3,596,000	360	72
Bauchi	2,431,000	243	49
Bendel	2,461,000	246	49
Benue	2,427,000	243	49
Borno	2,997,000	300	60
C/River	3,478,000	348	70
Gongola	2,605,000	261	52
Imo	3,673,000	367	73
Kaduna	4,098,000	410	82
Kano	3,775,000	578	116
Kwara	1,714,000	171	34
Lagos	1,444,000	144	29
Niger	1,195,000	120	24
Ogun	1,551,000	155	31
Ondo	2,730,000	273	55
Oyo	5,209,000	521	104
Plateau	2,027,000	203	51
Rivers	1,720,000	172	34
Sokoto	4,539,000	454	91

N.B.: Population figures used in the table were culled from 1981 Kano State Statistical Year-book p. 35

Rejection of the recommendation of the 1977 Customary Courts Reform Committee was in order: for, game of number to establish courts cannot give a satisfactory result. Population density should not be the only criterion but public morality and geographical factors should be equally considered. Hence, the returns from some States fairly compare with the ratio 1:10,000 people in some instances, 1:50,000 people in some other instances and an average of both in yet some other

circumstances. For instance, Kano State has a little over one hundred courts, including those of the Area, the High and the *Shari'ah* (Court of Appeal), and this is very close to an average of 1 court to 50,000 people whereas Niger State has a total of 74 courts, an average of (adding its figure on ratio 1:10,000 to ratio 1:50,000) about 50,000 people per court. Similarly, Borno State has about 200 courts which is about 67 per cent of what it should have on ratio 1:10,000 people. It can therefore be suggested that in places where the land is vast with thin population, an average of one court to 30,000 people could be considered while in thickly populated areas, the ratio of 1:50,000 could be desirable. The two considerations should take cognisance of public morality and easy access to the court by rural populace.

The role of religious belief in building confidence in the court and the legal system is important. Lord Lugard had realised this as earlier noted. This research has equally indicated such a role. In some places, Magistrates are regarded as agents of the old British colonisers; hence the lack of confidence in them and their courts. We therefore believe that courts should be established on the basis of religious adherence. As the Magistrates'/High Courts co-exist with the Area Courts/*Shari'ah* Courts of Appeal in a town, Customary Court/Customary Court of Appeal could be additionally established. Thus, the Muslims can take their cases to the *Shari'ah* Courts, the Christians to the Magistrates'/High Courts and the traditional worshippers to the Customary Courts. This observation will require a great reform in the laws which will be eventually Nigerianised (as recommended in the concluding chapter of this work). Meanwhile, with an average of one court for 30,000 people, (being the average of 1:10,000 and 1:50,000) 1,856 courts would have been established for the 55,670,000 people of Nigeria as at 1963: 973 in the North, 438 in the West, and 445 in the East. With the average percentage of 47.2 for Muslims, 34.6 for the Christians and 18.2 for the traditional worshippers, the *Shari'ah* Courts would have been 876, English/Christian oriented Courts 642 and Customary Courts 338. The following table shows the breakdown of such number of courts per region.

Table XXXI: Projected Number of Courts on Ratio 1:30,000 People According to Religious Inclination by Regions, Using 1963 Census Figures as Guide

Region	<i>Shari'ah</i> Court	English Court	Customary Court	Total
Northern	699	93	181	973
Eastern	1	344	100	445
Western	176	205	57	438
Total	876	642	338	1,856

N.B. Western Region figures include the Mid-West and Lagos hence the higher figure of English Courts than *Shari'ah* Courts. In most of the present Western States, Muslims are in majority as earlier discussed.

The establishment of courts can desirably follow the pattern of religious belief of the populace and this will certainly reduce the cost of justice dispensation. In Kwara State, for instance, there are about 173 Judges and Justices for the 75 lower and superior courts. Only 34 of the Judges and Justices are learned in the *Shari'ah* (31 in the Area Courts and three in the *Shari'ah* Court of Appeal) whereas the state is over 70 per cent Muslim population.²⁴¹ In correcting this anomaly, not less than 53 courts must be *Shari'ah* courts while the remaining 22 courts would be distributed to the Christians and the Traditional Religious worshippers accordingly. As such, the number of lower court judges will reduce considerably; for, a single *alkali* shall man a *Shari'ah* court and the higher *Shari'ah* court can be manned by a number of Justices to be determined by the volume of litigation in it as earlier noted. Similarly, appointment of judges for other States would be determined by the religion of the populace. The only problem envisaged in the success of this recommendation is religious sentiments and bigotry discussed in the following section.

5.5.4 Religious Crisis and Tension in Nigeria and the Judiciary English law is Christian in orientation; for nobody except an Anglican can become the King or Queen of England who has all along been regarded the 'defender of the Faith'. A British judge had confirmed this assertion in *Harvey v. Farnie*, in which he remarked:

If one of the numerous wives of a Muhammadan was to come to this country and marry in this country, she would not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country; a union falsely called marriage as a marriage to be recognised in our Christian country.²⁴²

Many Nigerian jurists and lawyers of the English system of law either ignored this fact to perpetuate English law in the country or embarked on the protection of their means of livelihood.²⁴³ As the Islamic jurists were complaining of the narrow jurisdiction of their courts, the promoters of the English system continued to defend the infinitesimal jurisdiction conferred on the *Shari'ah* courts by the 1979 Constitution. Justice U.Y. Abdullahi quoted from an unidentified source, the statement of such English-oriented jurists in respect of the bid of the Honourable Grand Kadis to get the 1979 Constitution amended for a wider jurisdiction for *Shari'ah* Court:

...if Nigerian citizens, Moslems or believers in other religions, have all along opted not to have their cases determined by 'Muslim laws' since 1979 or 'Islamic Personal Law' then one wonders on whose behalf the Hon. Grand Kadis are making the call for additional jurisdiction...²⁴⁴

Indeed, there is tension in the present Nigerian judiciary. The crisis is caused by the conflict of law and the drive towards legal harmony.

Conflict of law is inevitable in a nation of multifarious ethnic groups. I.O. Agbede identified various forms of conflict of law in this regard.²⁴⁵ There are bound to be Federal laws, State laws, Local Government laws, and International Private laws in such a nation like Nigeria. In effect, the courts will be faced with the problems of choice of jurisdiction, choice of law, and recognition as well as enforcement of foreign judgements. Agbede remarked on inter-state conflict of laws that all State High Courts in Nigeria apply 'substantially the same common law of England'. He added:

There is seemingly little or no indication that the judges are willing to relate this law to the social conditions of the particular state or to those of Nigerian society at large.²⁴⁶

On choice of jurisdiction, *Uchendu v. Uchendu* (1963)²⁴⁷ can be cited. Demonstrating his abhorrence for the judgement in that case, Agbede observed:

To oblige spouses ordinarily resident in Lagos to travel to the Eastern States in order to dissolve their marriage... in a federal union where there is unity of divorce law, is not only absurd but is also likely to bring the law into disrepute in the eyes of the intelligent members of the community.²⁴⁸

This observation is equally true of the Muslims from the Northern States, resident in the Southern States, who solemnised their marriages according to Islamic Marriage Law

but who have no opportunity of exercising divorce of such marriage until they travel back to the North despite the uniformity of Islamic Divorce Law which can be applied anywhere. S.A. Adesanya has also discussed these problems with particular reference to disposal of property by Nigerians through the English Wills Act.²⁴⁹ He digested the decisions of the superior court in *Mariyamo v. Sadiku Ejo*.²⁵⁰ Both Adesanya and Agbede concluded on the necessity for legal harmony in the country – a conclusion based on their Western orientation.

Legal harmony and unity cannot solve the problem of crisis and tension in the Nigerian judiciary. The Nigerian Law Reform Commission had attempted the provision of a harmonised Marriage law in the country and failed. It proposed to table a bill before the National Assembly in 1980 but public reaction led to its failure. The contribution of Dr S.K. Rashid to the debate on the bill was published in the *New Nigerian* newspaper of 25 February and 1 March 1983. That contribution led to the escalation of the problem encountered by the writer in the University of Sokoto, as earlier discussed. Indeed, the success of the unity in the Penal law through the Penal Code is still causing quite a number of problems as stated in different sections of this work.

In as much as the drive towards legal harmony is being vigorously pursued by the jurists of the English law system with little or no regard for the promotion of other laws, and as long as the promoters of the other laws are aware of the defects of the English system, the crisis and tension will persist unless the legal system is decentralised with parallel recognition for all the laws which will eventually lead to unity in diversity. Societal events vindicate this assertion. During the *Shari'ah* debate in the *New Nigerian* newspaper, in early 1986, Muslims wrote in support of *Shari'ah* system with topics like 'Let's Adopt Islamic System of Government' by Abdullahi Muli²⁵¹ and '*Shari'ah*: Panic or Panacea' by Muhammad Tawfiq Landan,²⁵² while the Christians wrote in opposition to the system like the article of Rev. Father Matthew Hassan Kukah entitled '*Shari'ah* Again?'²⁵³ Muslims realised that the debate was exposing the defects of the English system and enlightening the public about the *Shari'ah*, hence they preferred the debate to continue as evidenced in the article of Muhammad T. Suleman entitled 'Debate Should Continue',²⁵⁴ but the debate was eventually put to an end when it was generating high tension.

Religious bigotry is rampant in every nook and cranny of the country and demonstrated on virtually every social issue. When alcohol was banned in some parts of Ilorin town town early

1987,²⁵⁵ the *Daily Sketch* wrote an editorial, titled 'Abrogate That Law' on 26 January 1987, informing the public that 'Nigeria is a secular nation and that religion is a personal matter'.²⁵⁶ Similarly, the hues and cries that greeted the Nigerian membership of the Organisation of Islamic Conference (OIC) was capable of ruining the nation if not quickly checked. The 1978 Debate on the *Shari'ah* was equally a thorny event in the annals of the country's history. Of recent, the religious riots in Kaduna State indicate that religious consciousness and awareness are gaining ground in Nigeria.

The Kaduna riots started from a College of Education in Kafanchan where one Reverend Abubakar Bake was alleged to be misinterpreting the *Qur'an* to his Christian audience.²⁵⁷ This caught the attention of Hajiya Aisha Garba, a female student, who drew the attention of her Muslim colleagues to the gathering of the Christians.²⁵⁸ The Muslim students protested and they were persecuted by the majority Christian students, resulting in the murder of many Muslims and burning of mosques. News spread to the neighbouring towns where Muslims were in majority and they retaliated by burning churches and harassing Christians in their domain. Teenagers and university undergraduates were alleged to be very active in the operation.²⁵⁹ State governments consequently banned religious activities in schools to avoid the spread of the riot to other states of the Federation.²⁶⁰ Kaduna State government inaugurated a panel to investigate the incident and banned religious preaching not only in schools but also over the radio. Jama'atu Nasril Islam reacted to these measures, observing that:

a permanent solution to religious disturbance could be found only if Nigerians of different religious persuasions recognise the multi-religious nature of Nigeria and allow each other to have fundamental rights in accordance with its injunctions and the constitution.²⁶¹

Earlier in 1987, Nigerian Christians, under the umbrella of Christian Association of Nigeria, had threatened the Federal Government that it should publish the 'report of the Shagaya Panel on the country's membership of the Organisation of Islamic Conference' within 14 days,²⁶² thereby paving way for individuals to issue similar threats after the Kaduna riots. One Mallam Saidu Achi had warned that the religious disturbances would occur and reoccur until the Muslims were allowed to practise their religion 'in totality'.²⁶³ The Kaduna riots actually generated comments from the Muslims, the non-Muslims, the influential and the non-influential citizens.

Individual Muslims could not escape from threats by the Christians, as Chief M.K.O. Abiola was castigated by the Catholic Bishop of Minna Diocese, Dr Christopher Abba, and by an editorial comment of the *Nigerian Tribune*.²⁶⁴ Eventually, Kaduna State issued a white paper on the report of the Kaduna riots panel and promised to compensate the victims of the riot whose total claim amounted to about seventy-five million naira (₦75 million).²⁶⁵

The role of the Nigerian press in escalating religious crisis in the country is appalling. Kolono Lamba summarised this in a remark.

While the unguarded remarks by highly placed individual may been instinctive, and therefore their indictment may not after all be justified, those made by the press, in their newspapers, editorial, etc. are to say the least incendiary, and taught us a few lessons.²⁶⁶

The *Nigerian Tribune* championed the cause of Christian sympathy. It led many other newspapers based in the South (in most cases) while the *New Nigerian* seemingly championed the cause of Muslim sympathy. For instance, the award of King Faisal to Shaykh Abubakar Gumi received less attention of the Nigerian press than the Nobel prize award of Wole Soyinka. However, the *Nigerian Herald* wrote an editorial, congratulating Shaykh Gumi on the award.²⁶⁷ The apathy of the Nigerian press to Islamic issues led the Muslims to buying columns in the newspapers to discuss their issues.

The Alumni Association of Kano School for Arabic Studies popularly called 'SASOSA' paid for one-and-half pages (22 & 23) of the *New Nigerian* newspaper of 24/2/1986 to publish a rejoinder to the views of the Christian Association of Nigeria (Ten Northern States) carried by the same newspaper on 16/1/86 on 'Shari'ah Courts in the Southern States and Work-free Friday'. We recall that the Grand Kadis in the Northern States had expressed their support for the application of *Shari'ah* in the South when interviewed in 1986. Bashir Sambo argued that section 240 (1) of 1979 Constitution was meant specifically for the establishment of such courts in the South while quite a number of the Grand Kadis detested the hostility and pressure against the courts by the Christians. They resented hiding under the cloak of 'native law', rather, they preferred *Shari'ah* Courts *per se*, everywhere in the country, though governing only Muslim cases.

The Christians once again issued another threat to the Federal Military Government, under the umbrella of Christian Lawyers Fellowship of Nigeria. They demanded, among other

things, the repeal of 'Constitution (Suspension and Modification) (Amendment) Decree No. 26 of 1986' in which 'personal' was removed from the 'Islamic Personal Law' as applicable in the *Shari'ah* Courts.²⁶⁸ The threat was advertised in a quarter of a page in *The Guardian* advertisement column. The Jama'atu Nasrul Islam consequently sponsored a half page release in the *New Nigerian* newspaper of 3 June 1987 revealing the anti-Islamic activities of some Christian top government functionaries, with particular reference to O.I.C. and Kaduna riots.²⁶⁹ Subsequently, the Council of 'Ulama' of Nigeria paid for two pages in the *New Nigerian* newspaper of 18/6/87, alerting the Muslims of possible clash with the non-Muslims when provoked further.²⁷⁰ All these crises and tension had led to temporary ban of religious broadcasts over the radio as earlier mentioned and ban of religious activities in Nigerian institutions of higher learning by the Federal Military Government. It is noteworthy that the Minister of Justice and the Attorney-General of the Federation could not escape being castigated by a section of the Nigerian Bar Association over the amendments to the 1979 Constitution, particularly the decree which removed 'personal' from 'Islamic Personal Law'.²⁷¹ However, the root cause of these crises and tension had been traced to the distribution of fake Bibles and Qur'ans to the country through foreign agencies, particularly from South Africa.²⁷²

The only consolation for the survival of *Shari'ah* law in Nigeria amidst the tension lies in the recognition of the efficacy of Islamic law by some non-Muslim lawyers as earlier discussed and some Muslims of orientation in the English law system like the Chief Justice of Nigeria, Muhammad Bello CJ, and the current President of the Court of Appeal, M. Nasir JCA – both of whom had made commendatory remarks on the *Shari'ah* in papers presented and responses to interviews by the press both at home and abroad. The above optimism can be vindicated by the Federal Government's views on the Report of the Political Bureau which reads in part:

It is difficult to adopt Islamic system for the multi-religious Nigerian nation state. The adoption of such a system would exacerbate tension, leading to an unending religious feud. The Islamic values should be borne in mind in fashioning out a new social order for Nigeria.²⁷³

Our interpretation of that statement, particularly the last sentence, is that where Islamic law may not be directly applicable as on traffic, telecommunication, its values will be extracted through *Ijtihad* to make national law for such establishments.

Religion is a sensitive issue, particularly in Nigeria.²⁷⁴ Since some aspects of the English laws are good, such could be borrowed for adaptation to suit Nigerian context.²⁷⁵ Similarly *Shari'ah* values can guide the principles of Nigerian penal law. The major problem which only moral orientation can solve in Nigeria is the citizens' clever ways of circumventing laws.²⁷⁶ Another institution to watch is the Nigeria Police Force. The ineffectiveness of its members is however due largely to poor remuneration and poor condition of service like the judges of the Area Courts.²⁷⁷ Indeed, the problems which render the Nigerian judiciary defective in its present position are numerous, including lack of funds to buy even stationery items to produce copies of the judgements to litigants and a resort to demanding payment of such costs from the parties to a suit.²⁷⁸ We shall highlight in the next chapter, the solutions to these problems, particularly the place of *Shari'ah* system in this regard.

Notes and References on Chapter Five

1. Abdulmalik Bappa Mahmud, 'Codes of Judicial Ethics in Islamic Law'. Lecture delivered to Law Students Society, University of Sokoto, 1983. p. 4.
2. Muhammad Asad, *The Principles of State and Government in Islam*. Gibraltar: Dar al-Andalus Limited, 1980 pp. 24 & 25.
3. Umar Jah, 'The Importance of *Ijtihad* in the Development of Islamic Law', in *JICL* Vol. 7, 1977 p. 33; and A.M.H. Nour, 'The Schools of Law: Their Emergence and Validity Today' in *JICL*, Vol. 7 1977 p. 59.
4. J.N.D. Anderson and N.J. Coulson, *Islamic Law in Contemporary Cultural Change*. Sonderdruck aus SAECULUM XVIII Heft, 1-2, 1967 p. 19.
5. 'Abbas Husni Muhammad, *al-Fiqh al-Islami-Afaquhu wa Tatawwuruhi*. Makkah al-Mukarramah: al-^oAmanah al-^oAmah Li Rabitah al-^oAlam al-Islami, 1402 p.21.
6. Muhammad ^oAli as-Sayisi, *ash-Shari'ah al-Islamiyyah wa at-Tatawwur al-Ijtima'i Abr at-Tarikh al-Qahirah*: Matba'ah al-Azhar, 1387/1967p.18.
7. *ibid.* pp. 24 & 25
8. A.B. Yusuf, 'Legal Pluralism in the Northern States of Nigeria: Conflict of Laws in a Multi-Ethnic Environment'. Unpublished Ph.D. Dissertation, State University of New York, Buffalo, 1976, p. 81.
9. *ibid.* p.83.
10. A.P. Anyebe, *Customary Law: The War Without Arms*. Enugu: Fourth Dimension Publishing Co. Ltd. 1985 p.7.

11. According to Ezejiolor, the British government approved the application of 'native law and custom' and subjected it to repugnancy clauses of natural justice, equity and good conscience, incompatibility with any ordinance, and conformity with public policy' (G. Ezejiolor, 'Sources of Nigerian Law' in *Introduction to Nigerian Law* ed. by C.O. Okonkwo. London: Sweet & Maxwell, 1980 p.42.
12. A.C. 662.
13. J.N.D. Anderson, *Islamic Law in Africa*. London: Frank Cass, 1978 p.4.
14. A.P. Anyebe, p. 4.
15. A.B. Yusuf p.79.
16. *ibid.* p. 80
17. 1 E.A.C.A. 130.
18. J.N.D Anderson p. 3.
19. *ibid.* p. 172
20. G. Ezejiolor *op cit* p.51
21. *ibid.* p. 41; and Sulaiman Kumo, 'Organisation and Procedure of *Shari'ah* Courts in Northern Nigeria'. Unpublished Ph.D. Thesis, SOAS, University of London, 1972 p. 38.
22. J.N.D. Anderson, p. 4.
23. *ibid.* pp. 5 & 6.
24. Sulaiman Kumo *op cit* p.77.
25. N.R.N.L.R. 39.
26. A.P. Anyebe, *op cit* p. 16
27. J.N.D. Anderson *op cit* p.4.
28. We observe that Justice Brown must have ruled correctly and that the *alkalai* were wrong. After all, the Prophet Muhammed had adjudicated between the Jews in Medina with their own Jewish law and NOT with Islamic law.
29. The British administrators were wrong by merging Islamic law with animists' local custom. After all, Islamic law is written while the animists' customary law is not.
30. 8 W.A.C.A. 39.
31. J.N.D. Anderson, *op cit* p. 4.
32. A.P. Anyebe *op cit* pp. 7 & 8.
33. *ibid.* p. 5.
34. 13 W.A.C.A. 191, 192.
35. A.P. Anyebe *op cit* p. 11.
36. 1 N.L.R. 8.
37. 4 F.S.C. 44.
38. G. Ezejiolor, *op cit* p.43.
39. A.P. Anyebe *op cit* p.19.
40. Interview with Hon. Justice Yusuf Yakubu, President, Plateau State Customary Court of Appeal in Jos on 27 February 1986.

41. P.U. Umoh, *Precedents in Nigerian Courts*. Enugu: Fourth Dimension Publishing Co. Ltd. 1984 p. 178.
42. N.A. Fadipe, *The Sociology of the Yoruba Ibadan*: Ibadan University Press, 1970 p. 91.
43. An example is Western Region Customary Courts Law of 1956, i.e. Cap. 31 of the Laws of the Region.
44. W.R.L.N. 1956, Cap. 31 ss. 3 and 5.
45. Ibrahim Abimbola Aasa-Sadique, 'Dissolution of Muslim Marriages in Osun North-East Area of Oyo State', B.A. Long Essay, submitted to the Department of Religions, University of Ilorin, June 1985, p. 117.
46. Aminat Toyin Arikawe, 'Elements of the *Shari'ah* in Lagos State Customary Courts', B.A. Long Essay, submitted to the Department of Religions, University of Ilorin, June 1986, p. 19.
47. Aasa-Sadiq *op cit* p. 106.
48. On page 26 of the *Report on the Survey of Religious Organisations in the Oyo State* published in 1977, percentage population of the State according to religious adherence has been fairly represented, though we have reservations on the figure quoted for Ibadan Local Government Area. In all, Christians are in majority in only eight local government areas, representing about 33 per cent of the state's population.
49. W.R.L.N. 1956 Cap. 31, s. 19.
50. *ibid.* s. 23.
51. *White Paper on the Federal Military Government Views on the Report of the Customary Courts Reform Committee*. Lagos: Federal Ministry of Information 1978 p.16.
52. Interview with Dr D.O. Shitu-Noibi, Head, Department of Arabic and Islamic Studies, Univesity of Ibadan, on March 16, 1987.
53. *ibid.*
54. Aasa-Sadique, *op cit* p.107.
55. EACC/3/84 of Auchi Customary Court (Unreported).
56. Kora Abu Anefi, '*Shari'ah* Matters in the Customary Courts of Auchi – A Case Study'. M.A. Dissertation, submitted to the Department of Arabic and Islamic Studies, University of Ibadan, September, 1986 p. 65.
57. EACC/33/85 of Auchi Customary Court (Unreported).
58. Kora Abu Anefi *op cit* p. 67.
59. *ibid.* p.68
60. Muhammad b. 'Ali b. Muhammad ash-Shawkani, *Nayl al-'Awtar* Vol. VII. Beirut: Dar al-Fikr, 1973 pp. 75-78.
61. *Lagos Weekend* (Nov. 3-5 1979) Lagos, Nigeria p. 1.

62. **‘Ali as-Sa‘id al-‘Adawi**, *Hashiyah al-‘Adawi* Vol. II NP: Dar al-Fikr, ND pp. 65-67.
63. **Aminat Toyin Arikawe** *op cit* pp. 33 & 34.
64. **An Ikirun Customary Court Case No. CI/10/65-CRA 555721 of 14/1/65 (unreported).**
65. **Aasa-Sadique**, *op cit* p. 140 and his Appendix B1.
66. **Aminat Toyin Arikawe**, *op cit* pp. 34-37
67. *Lagos Weekend*, (March 23-25, 1979) p. 1.
68. **This is an area where the English system of law fails to promote morals. If this case were to be treated under a full-fledged Islamic system, the adulterer would have been punished for committing zina – so that he might serve as a deterrent to other members of the society.**
69. *Lagos Weekend* (April 20-22, 1984) p. 1.
70. **An Ikirun Customary Court Case No. C2/71/74-CR No. 0035925 of 25/6/74 (unreported).**
71. **Asa-Sadique**, *op cit* p. 40 and his Appendix B2
72. *Lagos Weekend* (May 18-20, 1979) p.3.
73. **Salih ‘Abd as-Sami‘ al-‘Abi al-‘Azhari**, *Jawahir al-Ikjil* Vol. I, Beirut: Dar al-Fikr, ND p.295.
74. **‘Ali as-Sa‘id al-‘Adawi** *op cit* pp. 65-67.
75. *Lagos Weekend* (April 20-22, 1984) p. 1.
76. **Musa Ali Ajetunmobi**, ‘An Analytical Survey of *Kafa’ah* (Equality in Islamic Marriage at the Dawn of Islam)’ in *JARS* Vol. 1. December 1984 p. 101.
77. **Muhammad b. ‘Ali b. Muhammad ash-Shawkani**, *op cit* Vol. VI pp.249-256.
78. **A.P. Anyebe**, *op cit* p.78.
79. **Galanville Williams**, *Learning the Law*. London: Stevens and Sons, 1982 p. 1.
80. **Ahmed Beita Yusuf**, *op cit* p.13.
81. *ibid* p.14
82. *ibid* p. 5
83. **A.P. Anyebe**, *op cit* p. 19
84. **Ahmed Beita Yusuf**, *op cit* p. 81
85. **A.P. Anyebe**, *op cit* p. 7
86. *ibid.* p. 21
87. **G. Ezejiofor**, *op cit* p. 41
88. **J.N.D. Anderson** *op cit* p.4
89. **Ahmed Beita Yusuf** *op cit* p. 82
90. **G. Ezejiofor**, *op cit* p. 41
91. **A.P. Anyebe**, *op cit* p.22
92. **Ahmed Beita Yusuf**, *op cit* p. 81
93. **G. Ezejiofor**, *op cit* p.41
94. **E.M. Kirpatrick**, ed. *Chambers 20th Century Dictionary*, Edinburgh. W & R Chambers Ltd. 1983 p.309

95. *ibid* p. 640
96. *ibid* p. 715
97. *ibid* p. 842
98. *ibid* p. 1369
99. J.N.D. Anderson *op cit* p. 378
100. Ahmed Beita Yusuf, *op cit* p. 85 Note 14
101. Ibrahim Tanko Muhammad, 'Maintenance of Wife Under Islamic Law: Its Application in the Northern States of Nigeria'. LL.M. Dissertation, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria, October 1984 p.174.
102. 11 S.C.I. 21
103. 17 N.L.R. 84
104. 4 F.S.C. 226
105. P.U. Umoh, *op cit* p. 103
106. Abdul-Malik Bappa Mahmud, *op cit* p. 11
107. Muhammad al-Khudari Bik, *Tarikh at-Tashrī al-Islami*, 9th ed. Cairo: Dar al-Fikr, 1387/1967 p. 95
108. Interview with Justice U. A. Kalgo, Chief Judge, Sokoto State on 9 April 1986 at Sokoto.
109. Lord Lugard, *Political Memoranda*, London: Frank Cass & Co. Ltd., 1970 p. 286
110. Interview with Hajia Fati Yusuf Imam, Chief Registrar, Sokoto State High Court, on 4 April 1986 at Sokoto.
111. Interview with Alhaji Abdu Aboki, Chief Registrar, Kano State High Court, on 25 February 1986 at Kano.
112. Interview with Mrs Z.Y. Aliyu, Chief Registrar, Bauchi State High Court on 27 February 1986 at Bauchi.
113. Interview with Mr C.T. Yerima, Principal Registrar (Litigations), Borno State High Court on 5 March 1986 at Maiduguri.
114. Interview with Alhaji Atiku Yusuf Lere, Chief Inspector of Area Courts, Kaduna State, on 19 February 1986 at Kaduna.
115. Interview with Mr L.C. Dakyen, Chief Registrar, Plateau State High Court on 28 February 1986 at Jos.
116. K. N. Kolo, 'An address of Welcome on the Occasion of Declaring Open the Two-day Conference of Judges, Kadis, Magistrates and Area Court Judges', Maiduguri; 20 December 1985 p. 4
117. Interview with Mrs Z.Y. Aliyu, 27/2/86
118. Interview with Alh. Abdu Aboki, 25/2/86
119. Interview with Mr C.T. Yerima, 5/3/86
120. Interview with Mr L.C. Dakyen, 28/2/86
121. K.M. Kolo, *op cit* p. 3
122. *The Constitution of the Federal Republic of Nigeria (CFRN)*, 1979. s. 240 (1).

123. Interview with Hon. Justice S.M. Alfa Belgore of the Supreme Court in Lagos on 9 March 1987. It should be recalled that the only Justice of the Court of Appeal with adequate knowledge of the *Shari'ah* law had joined the bench of the Supreme Court late in 1987.
124. Native Courts Law (NCL), 1963 s. 27; and Area Courts Edict (ACE), 1967 s. 24
125. K.M. Kolo, *op cit* p. 7
126. The *Daily Sketch*, Ibadan, Nigeria. 2 January 1987 p. 1
127. 'Abd ar-Rahman al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah*. Vol. IV. Beirut: Dar 'Ihya' at-Turath al-'Arabi, 1980 p. 394.
128. Since there is no *Shari'ah* School of Advocates, the 'Shari'ah lawyers' are of Western Orientation. It is reassuring that hundreds of lawyers with full knowledge of the *Shari'ah* are now being produced in a number of universities in Nigeria and beyond (Editor).
129. Section 3.3.2 of this work refers.
130. Interview with Dr Justice Hassan Gwarzo, Grand Kadi of Kano state *Shari'ah* Court of Appeal, Kano, on 24 February 1986 at Kano.
131. Interview with Mr L.C. Dakyen, 28/2/86
132. SCA/KN/170/1985 of 25/2/86 (Unreported).
133. Interview with Justice (Alh) Haliru Binji, Grand Kadi of Sokoto State *Shari'ah* Court of Appeal on 7 April 1986.
134. Section 4.2.3. of this work refers.
135. Interview with Alhaji Atiku Yusuf Lere 21/10/86
136. Interview with Alhaji Abdu Aboki, 25/2/86
137. Interview with Hajia Fati Yusuf Imam, 9/4/86
138. Interview with Mrs Z.Y. Aliyu, 27/2/86
139. Interview with Mr C.T. Yerima, 5/3/86
140. Interview with Justice (Alh) Abdulmaliki Bappa Mahmud. Grand Kadi of Bauchi State *Shari'ah* Court of Appeal on 28/2/86 at Bauchi.
141. Interview with Justice (Alh) Abdulkadir Orire, Grand Kadi of Kwara State *Shari'ah* Court of Appeal on 22/3/86 at Ilorin.
142. Abdulmalik Bappa Mahmud, 'Evidence Under Islamic Law', Lecture delivered to the Students of Kano State College of Islamic Legal Studies on 8 May 1984.
143. Section 2.3.1 of this work refers.
144. 'Ali Abubakar, *ath-Thaqafah al-'Arabiyyah Fi Nayjiriya Min 1750 Ila 1960 CE 'Am al-Istiqlal*. Beirut: Mu'assasah 'Abd al-Hafiz al-Busat, 1972 p. 220.

145. ʿAli Abubakar gave a detailed historical record of the school and submitted that the training of administrative and judicial officers was the main objective of the school. (*ibid.* p. 221).
146. Interview with Justice (Alhaj) Haliru Binji, 9/4/86.
147. ʿAli Abubakar, *op cit* p.223.
148. According to Prof. I.A.B. Balogun, who was a student of the school from 1955 to 1959, his ability to pass the General Certificate of Education (GCE) at the Advanced Level in 1957 as a private candidate, i.e. after only three years' training in the school, spurred the school authority, particularly Mr Hiskett, the Vice-Principal of the school, to encourage the Northern Region government to establish a section for special training of students in three subjects within only two years. The section was eventually established in 1960 for students who had adequate qualification in English language and allied subjects like Professor Balogun who gained admission into the college in 1955 after his Grade II Teachers' Certificate. He passed GCE O'Level in English in December 1955 before making attempts to pass A'Levels in other subjects. In an interview with him, i.e. Professor Balogun, Head, Department of Religions, University of Ilorin, on 14 April 1988, we gathered that this section of the school later led to the establishment of Bayero College which eventually developed to the present Bayero University, Kano.
149. Ahmadu Bello University, *Prospectus: Session 1972-73* (ABUPS, 1972/73). Zaria: The University Press, 1972 p. 67.
150. *ibid.*
151. *ibid* p. 68.
152. Faculty of Law, 'Numbering of Subjects With Effect from 1985/86 Session' (FLNS), Zaria: Ahmadu Bello University, 1985.
153. Bayero University, *Prospectus: 1980/ 81 Session* (BUKPS, 1980/81, Kano: Bayero University, 1980, p. 169.
154. Bayero University, *Prospectus: 1981/ 82 Session* (BUKPS, 1981/82), Kano: Bayero University, 1981, p. 144.
155. *ibid.* p. 145.
156. Faculty of Law, *Prospectus: 1980-81 Session* (USPS, 1980/ 81). Sokoto: University of Sokoto, 1980 p. (i)
157. *ibid* p. (ii)
158. Interview with Dr Ma'aji Isa Shani, Head, Department of *Shari'ah*, University of Maiduguri on 3 March 1986 at Maiduguri.

159. Interview with Dr Ihinger, Lecturer, Department of *Shari'ah*, University of Maiduguri on 6 March 1986 at Maiduguri.
160. Interview with Dr S.K. Rashid, Head, Department of Islamic Law, University of Sokoto on 9 April 1986 at Sokoto.
161. J. C. Nkala is of Zimbabwe nationality. He was the then Acting Dean of the Faculty of Law, University of Sokoto.
162. *Report of the Committee on the Future of the Nigerian Legal Profession*. Lagos: Federal Government Printer, 1959 pp. 21 & 22.
163. *ibid* p. 21
164. *ibid* p. 22
165. *FLNS op cit*
166. Faculty of Law, 'The 3 years Course Structure as Approved by Senate', Kano: Bayero University ND.
167. Faculty of Law, *Faculty Prospectus and Other Information: 1983/ 84 Session*, Sokoto: University of Sokoto, 1983 p. iv
168. Interview with Justice (Alh.) Haliru Binji 7/4/86.
169. For instance, not less than 25 credits of such non-law courses must be earned, according to the Law Curriculum of the University of Ilorin, before it was scrapped (R.W. James, 'The LL.B. Curriculum with particular reference to the final year course groupings' in *The Jurist* Vol. I ND. p.43).
170. King Abdul-Aziz University, *Catalog: 1399-1400/1979-1980*. Makkah al-Mukarramah: *Dar al-funun li at-Tiba' ah wa an-Nashr Wa at-Taghlif*, 1979 p. 26.
171. M.K. Masud, 'Teaching of Islamic Law in Nigeria: An Appraisal of the Teaching Methodology'. Paper presented at the Workshop on The Teaching of Islamic Law in Nigeria held at the Faculty of Law, University of Sokoto, on June 1 & 2 1983, p.1
172. *ibid*. p. 2.
173. *ibid*. p. 3.
174. R.W. James, *op cit* p.44.
175. BUKPS, 1980/81 p.169; and BUKPS, 1981/82 *op cit* p. 144.
176. R.W. James, *op cit* p.44.
177. Interview with Hajia Fati Yusuf Imam 9/4/86
178. *The Daily Sketch*, 19/8/1987, p. 1.
179. *The Daily Times*, Lagos, Nigeria 28/2/1987 p. 7
180. *The Sunday Tribune*, Ibadan, Nigeria 9/3/1986 p.12
181. *The New Nigerian* Kaduna, Nigeria 8/7/1987 p. 16
182. *The Nigerian Herald*, Ilorin, Nigeria 8/6/1987 p. 5

183. Mr L.C. Dakyen of Jos High Court wondered why such law should be tolerated for operation in the country 25 years after independence.
184. *The Punch*, Lagos, Nigeria 19/8/1987 p. 16
185. *Friday Nur* Lagos, Nigeria 2-7 July, p.1
186. *The Nigerian Tribune*, Ibadan, Nigeria 14/7/1987 p.3
187. *Kano State Statistical Year Book*, 1981 Kano, The Government Printer, 1981 pp. 269-274.
188. Interview with Mr O. Ubi Okoi, Public Relations Officer, Kaduna State Police Command on 19 February 1986 at Kaduna.
189. *The New Nigerian* 19/5/1987 p.1.
190. The government has embarked on the building of new prisons in its bid to minimise prison congestion. It has commissioned four prisons before the end of May 1988. They are those of Benin City, Ondo, Potiskum and Argungu.
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192. *The New Nigerian* 25/4/1987 p.5
193. *The Daily Times*, 25/4/1987 p.8
194. *The New Nigerian* 1/8/1986 p. 1
195. Qur'an, 2:191
196. *The Daily Times* 29/4/1987 p.4
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207. *The New Nigerian*. 1/4/1985 p. 1
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211. Interview with Justice U.A. Kalgo 9/4/86
212. Interview with Mrs Z.Y. Aliyu 27/2/86
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217. Interview with Alhaj Abdul Aboki 25/2/86
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219. K.M. Kolo (1986) *op cit* p.3
220. K.M.Kolo (ND) *op cit* p. 3
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222. Interview with Justice U.A. Kalgo 9/4/86
223. *The New Nigerian*, 8/7/1987 p.5
224. *The Nigerian Tribune*, 29/10/1986 p. 7
225. *The Guardian*, Lagos, Nigeria 22/4/1987 p.1
226. Interview with Justice (Alhaj) Abdulkadir Orire 22/3/86
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228. Interview with Justice U.A. Kalgo 9/4/86
229. Interview with Justice (Alh) Bashir Sambo 7/4/86
230. Interview with Alh. Abdu Aboki, 25/2/86
231. M.A. Hanbali *op cit* p.9
232. Interview with Mr L.C. Dakyen 28/2/86
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 260. *The Nigerian Tribune*, 30/3/1987 p.1
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CHAPTER SIX

Conclusion

This chapter gives a summary of the preceding chapters and makes recommendations on the administration of justice in Nigeria in general, and *Shari'ah* legal practice in particular. It is therefore divided into two: Summary and Recommendations.

6.1 Summary

In this section, there are two main divisions:

- i. *Shari'ah* in the Nigerian Society; and
- ii. *Shari'ah* in Nigerian Courts.

6.1.1 *Shari'ah* in the Nigerian Society

Prior to the nineteenth century C.E., the area that was later named Nigeria had not less than 450 ethnic groups. Politically, however, they constituted a less number of autonomous kingdoms. Islam had spread to Kanem-Borno empire earlier in the tenth century, to Hausaland in the thirteenth century, and to Yorubaland in the sixteenth century. Many rulers and their subjects in sixteen kingdoms had thereby professed Islam as their religion. In fact, Islam was, as still is, predominant in those areas. Christianity was introduced later and it gained ground with the assistance of British colonisation of the country. Consequently, the major cultures of the people of Nigeria became principally three: the indigenous, the Islamic and the Christian. As Muslims and Christians are thereby found in almost every community, those who refuse to convert (to either of the two new religions) retain their respective traditional modes of worship and culture.

The three principal divisions of the heterogenous society led to the prevalence of three main laws: the indigenous law, the *Shari'ah* law, and the English law (which was introduced by the British Christian colonisers). The teaching and application of *Shari'ah* law went concurrently with the introduction of Islam into any domain, and Nigeria was no exception. *Shari'ah* legal system prevailed in the Northern part of Nigeria in a fluctuating manner until ʿUthman dan Fodio and his lieutenants put it on a solid ground through a *jihad* in the nineteenth century. Subsequently, there were not less than 25 metropolitan *alkali* courts in the Caliphate established by ʿUthman dan Fodio within Nigeria. Thus, both the civil and

the criminal aspects of the *Shari'ah* law were applied in all their ramifications for about a century prior to the arrival of the British in the area.

The advent of British rule marked the reduction in the scope and jurisdiction of *Shari'ah* legal practice in Nigeria. The British government was determined to wipe out both the indigenous and the *Shari'ah* legal practices from the Nigerian society. It came with a subtle persuasive approach of legal harmony through which English law was superimposed over the two other laws. Many Proclamations and Ordinances were made to achieve this aim of legal unity. For instance, cases decided in native tribunals lay on appeal in Magistrate (English) courts. It was thereby easy for the British judges to nullify the decisions of the court below through the application of the repugnancy clauses – which were specifically and carefully worded for that purpose. Moreover, the native court judges (including the *alkalā*) were poorly remunerated – a matter which contributed in no small measure to their corruption. The adverse effects of such corruption include easy castigation and loss of public credibility as well as loss of confidence in the *Shari'ah* law which most of such judges administer in their courts, particularly in the North.

Muslim rulers and elites all over Nigeria could foresee the inherent danger in the pursuance of legal harmony for the country. They were therefore not silent over the issue. They sent petitions to both the British government and the several established committees and commissions to investigate one aspect or another of the legal system. Consequently, the Commissions of Inquiry, Study Groups, and the Reform Committee of 1949, 1952, 1958, 1962, 1966 and 1977 respectively affirmed, re-affirmed and confirmed the viability of native tribunals in Nigeria, and several recommendations were made for improving them. Furthermore, Lord Lugard had earlier detected the impracticability of legal harmony in Nigeria from his experience with the administration of justice among the Bassa people. He had also discovered the efficacy of Islamic law, both civil (commercial transaction), and criminal (*Hadd* punishment).

Conflict of law is inevitable in a heterogeneous society with multifarious ethnic groupings like Nigeria. In realisation of this, Brooke Commissions of Inquiry on Native Courts were set up between 1949 and 1952 and they recommended parallel legal system rather than legal harmony. Yet the government continued with its programmes on legal unity. Abu Rannat Committee on the Re-organisation of Northern Nigerian Courts

which worked between 1958 and 1962 identified the viability of native tribunals, yet it recommended a hybrid compromising legal system which actually enhanced the pursuance of legal harmony. The Committee eventually divested *Shari'ah* Courts of superior record criminal jurisdiction in favour of the English Courts. It also reduced drastically, the civil jurisdiction of superior *Shari'ah* courts. When Bello Study Group was set up in 1966, the expectation of the then government was a recommendation of a complete abrogation of Islamic law in Nigeria because Major Nzeogwu Kaduna had attempted it but failed. Yet report of the Study Group enhanced the retention of native tribunals (including Islamic courts) rather than abrogating them. It however recommended that the State government should take over such lower courts from the local government authorities.

Ten years later, the Area Courts Reform Committee was set up to investigate further, the viability of Native tribunals. Report of the Committee submitted in 1976 confirmed the revelations and recommendations of the Bello Study Group. However, the 1976 committee came out with a catalogue of additional recommendations which, if fully implemented, would solve quite a number of the problems inhibiting the progress of the present Nigerian judiciary. A similar committee was set up on the customary courts of Southern Nigeria. The committee actually discovered the viability of native tribunals like others before it; yet its recommendation that there should be no 'Muslim courts' for the Muslims in Southern Nigeria was, in our opinion, unfortunate.

Instead of the government to improve the indigenous and the *Shari'ah* legal systems, it seems that the British brainwashing prevailed on its legal administrators who were, and still are perpetuating legal harmony, despite all its glaring deficiencies. The omission of Abu Rannat Committee in allowing a Kadi of *Shari'ah* Court to sit in the appellate session of the High Court was challenged in the early 1960s with the late Sardauna of Sokoto coming to the rescue. Yet the laws of Northern Nigeria were not amended to put all cases of Islamic matters under the *Shari'ah* courts. Many similar cases have been continuously nullified by the (Federal) Court of Appeal on the grounds of repugnancy of that practice to the spirit and letter of the 1979 Constitution in respect of the constitution of the High Court appellate session. Additionally, every Justice of the Federal Court of Appeal (including those to administer *Shari'ah* law) should be a legal practitioner with not less than twelve years, experience in Nigeria, according to the requirements of the 1979 Constitution.

Thus, in pursuance of legal harmony, many experienced Grand Kadis and Kadis of the *Shari'ah* Courts of Appeal who could have been appointed Justices of the (Federal) Court of Appeal have been constitutionally deprived of that appointment simply because they are not learned in English (Christian) law! These means of pursuing legal harmony have been causing the nullification of many Islamic cases when they lay on appeal in superior English-oriented courts. All these indicate lack of preparedness of the government to implement the recommendations of the several committees it set up on native tribunals simply because such recommendations fall short of its expectations.

The importance of native tribunals (including *Shari'ah* courts) in Nigeria cannot be over-emphasized. In 1949, they tried over 550,000 cases while the English courts (of all grades) tried less than 50,000 cases. Fifteen years later, the Native tribunals in the North decided over 223,000 cases while the English courts decided less than 2,000 cases. Rather than developing and improving the lot of the native tribunals, it seems that legal administrators, being trained in the English legal system, were making use of the data in the various reports of the committees and the commissions to promote the English system to the neglect of the native tribunals which are the most viable. For instance, the number of native tribunals in the Northern States which was 752 in 1962 had been reduced to 542 by 1976 (29 Upper, 312 Grade I and 201 Grade II Area Courts). Whereas the discovery of the importance of these courts was by not only the committees and commissions of inquiry but also by individual writers such as Justice Anyebe who revealed:

The advantages of these Native Courts in Nigeria are very great. At the present time they fill a gap in the Judicial system which could not otherwise be filled save at a prohibitive cost and, moreover, they do the work allotted to them more efficiently than it could be performed by most British magistrates.¹

Yet, as the number of the native tribunals were decreasing with time, so also were their jurisdiction reducing gradually. At present, they exercise criminal jurisdiction to some limited extent; still such may soon be scrapped as Islamic Penal law was abrogated earlier. The mechanism by which the Penal Code was introduced to displace Islamic Penal law is now on gradual reintroduction to divest Area Courts of criminal jurisdiction. As the Penal Code was misplaced in application by which the *Shari'ah* Courts of Appeal were considered unfit for it and by which many Islamic cases were quashed at the

English courts, the Area Courts have been considered incompetent to handle criminal cases.

We see the need to Nigerianise the Nigerian judiciary. The adverse effects of tailoring Nigerian laws towards the English law are too many. The abolition of *Shari'ah* penalties for those of the Penal Codes has contributed (even if partially) to the increase in the wave of crime in Nigeria. Similarly, the drive towards legal harmony with the resultant corruption of Area Court judges has led to the dented image of such judges, and to a caricature and mockery of the *Shari'ah* law which most of them in the North apply. Area Courts operate in unbefitting buildings, yet they are busier than the Magistrates' Courts. Area Court judges receive less remuneration compared to the Magistrates who are superior to them in paper qualification. All these *ipso facto* have psychological effects on the performance of the Area Court judges.

The plight of the *Shari'ah* Courts of Appeal and their Justices (Kadis) is not better than that of the Area Courts. Many *Shari'ah* Courts of Appeal conduct their daily business in unbefitting buildings, for example, as in Jos. Moreover, the Chief Judge of the High Court is regarded superior to the Grand Kadi at least on protocol basis, hence, the retention of the chairmanship of the Judicial Service Committee by the former. Attorneys-General are appointed from the lawyers learned in English Law, thus the laws of the States are often with sympathy for that law at the neglect of the *Shari'ah*. In fact, the low returns of cases by the *Shari'ah* Courts of Appeal as compared to the annual returns of the High Courts was not due to indolence or incompetence of *Shari'ah* Court Justices, rather it was due to the limited jurisdiction conferred upon them by the laws. For instance, when the law favoured Kano State *Shari'ah* Court of Appeal in 1980, it decided 627 cases, whereas its counterpart in Gongola State decided only eleven cases in the same year. Gongola State laws favoured the High Court more than the *Shari'ah* Court of Appeal, hence the former decided a total of 57 civil and 78 criminal cases (original and appeal in both cases), totalling 135 cases in 1980.

Indeed, the introduction of English law into Nigeria has adverse effects on the entire judiciary of the country and the *Shari'ah* legal practice in particular. Such effects cover also legal training. *Shari'ah* legal learning is now in a confused state. The training institutions are in a dilemma as to what to teach, how to teach and what amount of English/*Shari'ah* law to teach. Sulaiman Kumo observes:

The effect of this neo-colonial psychology on the study of Islamic law in our universities and on its application in our courts of law has been perhaps more profoundly negative than on any other aspect of our national life.

Deficiencies and shortcomings of English law system, as applied in Nigeria, are many and discernible. District Commissioners often abused their powers during the colonial days when they were presidents of Native Courts. Actually, such commissioners were the courts; in their absence there would be no sitting. Furthermore, the English law system has caused, directly or indirectly, increase in the rate of crime in Nigeria. Police reports from 1940 to 1962 revealed the extent to which crimes were committed during the colonial rule while the statistics of congestion in the prisons at present reveal the escalating rate at which crimes are now being committed. In 1976, there were 13,255 prisoners in four prisons of Oyo State: 13,047 males and 208 females. Out of the figure, there were 6,050 males and 119 females in Ibadan; 1,205 males and 13 females in Ile-Ife; 4,466 males and 66 females in Ilesha; and 1,326 males and 10 females in Oyo town prisons. Similarly in 1978, there were 11,217 prisoners in Kano State; 10,865 males and 352 females distributed to the six towns of Kano, G/Dutse, Kazaure, Gumel, B/Kudu, and Hadejia with Kano City Prison topping the list with 9,746 males and 338 females. The geometrical rate of increase in the inmates led to riots in the prisons as happened in Benin early 1987.

The root cause of the failure of English law system in Nigeria can be traced to the distinction and dichotomy between 'law and morality'. In that regard, the director of the Institute of Advanced Legal Studies has detected some faults and defects in Nigerian law of criminal procedure which vindicates the divorce of law from morality in the legal system of the country.⁶ Furthermore, and commenting on a recent judgement of the Jos Division of the (Federal) Court of Appeal in which adultery was counted out of criminal offence, under Tiv Native Law, an editorial opinion of the *New Nigerian*⁷ newspaper summarised the public view on Nigerian laws and the judiciary as follows:

We would add that public perception of operating laws determines what confidence is reposed in the judiciary and its chances of upholding society's accepted norms for the betterment of citizens. It is therefore important not just to codify our laws but to harmonise them with society's understanding and expectations.

Writing in the same direction, the *National Concord* newspaper lamented in an editorial view⁸:

Over the last few weeks and months, violent urban crime has resurfaced with a vengeance, and the loss of lives, the snatching of vehicles and a pervasive climate of fear have come to characterise daily existence in such places as Lagos, Ibadan and Benin City.

These and many other revelations in the preceding chapters indicate the failure of both the law enforcement agents and the judiciary to win public confidence. They have both failed to promote genuine safety which is a prerequisite for peace and progress in the society. Neither is there confidence in the prison system which consumes public money through maintenance of prisoners and warders.

An alternative to the English law system in Nigeria is the *Shari'ah* law. The efficacy of its penal system is not in doubt. The penalties are divinely worked out in a way that every member of the society should be his brother's keeper. Hence, when one member is behaving viciously, he must be quickly checked by his brother. An instance is the provision of *Diyah* for unintentional and, in some cases, for semi-intentional culpable homicide. If the killer cannot afford the cost of *Diyah*, his relatives (*aqila*) should come to his aid, and if they too are incapacitated, the government must come to their assistance. Of recent in Saudi Arabia, 16,000 Riyal was awarded as *Diyah* against a killer who could not afford it but whom the relatives aided.⁹ We have also mentioned above, how Lord Lugard had admired Islamic civil law, particularly the law of commercial transaction.

What makes Islamic law efficacious are the constituents of its source: reason and revelation. The law is expanded through *Ijtihad bi ar-Ra'y* – with the application of reason – whose deficiencies are arrested by revelation and prophetic interpretations. Thus, absolute virtue and vice can be distinguished from one another. As such, peace will reign supreme in any society in which the law operates. The scope of Islamic law reveals its flexibility and coverage of all acts of man in life. In fact, it goes beyond the regulation of man's mundane affairs, it guides him to a blissful life after death. The recognition of the relationship and importance of morality to law makes Islamic law suitable for application anywhere, any age and for any event. As water is an essential ingredient to life, *Shari'ah* is an essential law for not only the Muslims but humanity at large.

Instead of promoting Islamic law in Nigeria, government efforts were geared towards the production of legal luminaries in the English system. Early *Shari'ah* law schools were scrapped

by the government for the old Kano Law School which changed curriculum as frequently as a chameleon changes colours. Its substitutes today are the Faculties of Law in Ahmadu Bello University, Zaria; Bayero University, Kano; and the Universities of Maiduguri and Sokoto. The predicaments of these faculties in producing *Shari'ah* lawyers include lack of *Shari'ah* College of Advocates. Hence, in the strict sense of the situation, there is no *Shari'ah* legal practitioner among the products of such Faculties because they were called to the Western oriented bar after going through the Law School in Lagos. Yet they are manageably accepted as *Shari'ah* lawyers but their number is small in view of the need of the society. The depth of knowledge of the lawyers with dual qualification is questionable. Their lecturers face a lot of teaching problems, ranging from methodology to the background knowledge of students and unavailability of suitable textbooks, journals, and law reports on *Shari'ah* legal practice.

According to the minutes of the meeting of a Committee on the Qualification of Area Court Judges, set up by the conference of the Chief Judges and Grand Kadis in Northern States,

- a. Justice Muazu Muhammad, Chief Judge of Niger State, observed that law personnel produced in Nigerian Institutions were often found wanting when employed to practise what they acquired;¹⁰
- b. Justice A. Abubakar Mahmud, Grand Kadi of Gongola State, noted that such judicial officers lack the knowledge of Arabic;¹¹
- c. Justice Shaykh Ahmad Lemu, Grand Kadi of Niger State, traced the predicament of the training institutions to the Law School in Lagos which must approve their programmes;¹²
- d. Justice Yusufu Yakubu, President of the Plateau State Customary Court of Appeal, suggested that judges should pass qualifying examinations before appointment; and annual seminars should be organised for serving judges.¹³

The foregoing became the fate of *Shari'ah* legal education due to the confusion created by the pursuance of legal harmony in Nigeria. If the government is ready to make appreciable reforms in this regard, it will not take much time to yield some fruits. *Shari'ah* College of Advocates should be established for legal practitioners of *Shari'ah* orientation. A *Shari'ah* law faculty should be established in the South where the many

Muslim judges of the South-Western Zone can be given courses similar to the present Basic Judicial Training of Ahmadu Bello University. Fortunately, the Islamic and the Yoruba customary laws agree considerably, particularly in civil matters and specifically in areas of matrimonial cases. Such Muslims will spend less or little time to grasp the purport of Islamic law.

Religious crisis and tension in Nigeria equally form a major factor militating against the application of *Shari'ah* law on a wider scale. Christian missionaries of the past left no stone unturned to *Christianise* Nigeria in all spheres. They were aided by the British colonisers and the English law which is Christian in orientation – a tool with which they actually *Christianised* the Nigerian judiciary. Their sympathisers continued with hostility to *Shari'ah* legal practice in the country till this day. They perpetuated the gradual abrogation of Islamic law under the cloak of legal harmony with incessant challenge and nullification of Islamic cases and judgements in the English courts which are rated superior to *Shari'ah* legal tribunals. Indeed, religious awareness in the Nigerian society has been contributing in no small measure to the crisis and tension in the judiciary.

With the hue and cry over the Nigerian full membership of the Organisation of Islamic Conference (OIC), the conclusion was the retention of the *status quo* by Nigeria as a mere observer.¹⁴ The crisis was so tense that the government had to set up an Advisory Council on Religious Affairs with membership drawn equally from the Muslims and the Christians of different denominations. The pessimism of the Nigerian populace on the workings of the Council was summarised on page 7 of the *Nigerian Tribune* of Wednesday, 8 July 1987. It was noted that during a deliberation at a meeting, the members were divided equally between the Muslims and the Christians and this 'restated their irreconcilable positions, while the government officials watched in utter helplessness'.¹⁵

The role of the press concerning the *Shari'ah* legal practice in Nigeria is rather uncomplimentary. Some newspapers could not control their hostility to *Shari'ah* legal practice in Nigeria. For instance, after calling for the abrogation of the local government bye-law which prohibited the sale of alcohol in some parts of Ilorin township, the *Daily Sketch* wrote another editorial comment, challenging the recent orders of the Chairman of Bauchi Local Government to unmarried ladies of marriageable age to get engaged and attached to some husbands within a stipulated period.¹⁶ The hostility notwithstanding, many people have realised the relevance of *Shari'ah*

legal practice in the Nigerian society and they have given objective recommendations in that regard. For example, Dr S.A.I. Salawu of Ahmadu Bello University Teaching Hospital in Zaria forwarded the following observation and recommendation:

Perhaps it is not outlandish to suggest that in order to rationalise (whatever that word really means) the judicial system in both geographical halves of the country, the customary courts system should be introduced in the North while *Shari'ah* courts are introduced in the South. This should go a long way in helping to avoid misgivings and allaying fears about the functions of one set of courts *viz-à-vis* the other. In other words, the three systems should operate throughout the Federation. Furthermore, these additional courts will help to reduce the perennial delays encountered in obtaining verdicts (whichever out of our courts).¹⁷

In support of this view, we wish to add that the Federal Government should take over the funding and control of the entire Nigerian judiciary from the lowest to the highest cadre of the courts.

6.1.2 *Shari'ah* in the Nigerian Courts

By the organisational structure of Nigerian courts of *Shari'ah* jurisdiction prior to the military rule, Native Courts were established and controlled by the Provincial Commissioners. Later, such courts which had changed names to Area Courts were established and controlled by the Chief Judge of the respective states. In 1929, there were 529 Native Courts in Northern Nigeria. The figure continued to increase arithmetically until efforts were geared towards their reduction as earlier noted. For instance, there were 633 Native Courts in the North, 631 in the West, 624 in the East, and 17 in the Colony [of Lagos] as at 1949. By 1957, the number of such courts in the North had increased to 723 (81 Appeal and 642 of other grades); and 752 in 1962 as contained in Table VIII. According to Beita Yusuf, population of between 30,000 and 50,000 people used to have an *alkali* court in Kano in the past,¹⁸ but around 1975 it was discovered that one *alkali* court was serving a population of 100,000 people.¹⁹ These revelations indicate the intricacy of using population to establish courts. For instance, if the population of Nigeria according to 1963 census figures contained in the *Nigeria Yearbook* of 1972 is used to compute the required number of Native Courts in Nigeria on ratio 1:30,000 and ratio 1:50,000 people respectively, each of the three provinces would have had the following number of courts:

- i. North: 995 or 597 for 29,237,559 people
 - ii. East: 455 or 273 for 13,639,631 people; and
 - iii. West: 449 or 269 for 13,456,832 people
- Total: 1,899 or 1,139 for 56,934,128 people;

Whereas, the highest number of courts recorded for the North in 1962 was 752 – a figure nearing an average of 995 and 597.

The Provincial Commissioners who established Native Courts had no power to appoint judges, likewise the Chief Judge in respect of Area Courts. The Native Authority appointed judges for the Native Courts while the Public Service Commission equally appointed them later as well as for the Area Courts. The arrangement led to a clash of authority, first between the Provincial Commissioners and the Native Authorities and second between the Chief Judge and the Public Service Commission. Consequently, Judicial Service Commissions were established to arrest the conflict of powers. The Commission established Area Courts, appointed and controlled the judges through the vigilant eyes of the Chief Judge of the respective state. However, some problems still arose, first on the chairmanship of the Commission (which has recently changed name to 'Committee'), and second on the complaints of neglect levelled against the Chief Judges by the judicial officers of the Area Courts section who equally showed resentment to their control by the Grand Kadis.²⁰

Responses of the Grand Kadis revealed that they were not 'power-drunk'. Alhaji Muazu Aliyu wanted the Area Courts to be under the control of 'the most knowledgeable person in the laws they apply' while Dr Hasan Gwarzo opined that both the High Court section and the *Shari'ah* Court of Appeal should supervise their respective laws being applied by the Area Courts.²² Alhaji Abdulkadir Orire observed that 'a separate division should be established for the Area Courts with a substantive Chief Registrar as practised in Gongola State' ²³ while Alhaji Bashir Sambo complementarily submitted that the powers of controlling the Area Courts should be shared between the Grand Kadi and the Chief Judge of each state.²⁴ It is therefore established that statutorily, the powers to control the Area Courts constitute a problem which has culminated into a rivalry between the High Court section and the *Shari'ah* Court of Appeal – a situation abhorred by Alhaji Haliru Binji,²⁵ for it appeared as if the *Shari'ah* Courts section was soliciting for powers like the High Courts section.

Shari'ah Courts of Appeal were established by the constitution of the Federal Republic of Nigeria and the laws of the respective

states having one. It has been clearly established that there are not such courts in the Southern States of the country. The anomaly was partially caused by the flexibility of section 240 (1) of 1979 Constitution which contains the phrase 'any state that required it'. In view of the necessity of *Shari'ah* Courts in the South, we recommend that the section of the constitution be reviewed to make the establishment compulsory for every state of the Federation as later discussed. Letters of the constitution and the laws of every state and Abuja should be unequivocal and devoid of ambiguities on the establishment of *Shari'ah* courts, in view of witch-hunting one another by the operators of the English law and the *Shari'ah* law. As the power to appoint *Kadis* was rotating between the states and the Federal authorities, we feel that such power should be permanently retained by the Federal authorities on the advice and recommendation of the State Governments. The control of the court was appropriately put under the Grand Kadi and this we feel should be allowed to continue.

The constitution of a lower court on any *Shari'ah* matter was a single Kadi but on a mixed cause, at least a Kadi must be a member of the trial court. This is appropriate, yet our final recommendations in the next section seems to us more appropriate. As regards the constitution of a *Shari'ah* Court of Appeal, the 1979 Constitution stipulates 'at least two *Kadis*²⁶ while that of the (Federal) Court of Appeal is 'not less than three Justices of (Federal) Court of Appeal learned in Islamic (Personal) Law'.²⁷ The constitution of the Supreme Court is usually 'not less than five Justices of the Supreme Court'.²⁸ We observe that ideally, a single Kadi should preside over any Islamic case, be it original or appeal – as practised in the lower Area Courts. In that direction, the constitution of the High Court appellate session is, 'at least one judge of that court'²⁹. Through it, many Islamic cases in which a Kadi of the *Shari'ah* Court of Appeal participated in the decision were nullified at the Court of Appeal, e.g. *M. Ado and Hajia Rabi v. Hajia Dije* (1983). We therefore wonder why what should have been stipulated for the *Shari'ah* Court of Appeal was transferred to the High Court. Relevant sections of the 1979 Constitution to the *Shari'ah* Court of Appeal, the (Federal) Court of Appeal and the Supreme Court should be reviewed in this regard to take cognisance of pristine Islamic practice of one judge for one court.

Functions of the Inspectorate Division of the Area Courts include transfer of cases to appropriate courts, review of cases in some circumstances, and general inspection of courts in

order to forestall miscarriage of justice. The division performs creditably well, particularly on such courts located in the rural areas, due to the people's level of civilisation. It is hereby recommended for retention. It may be scrapped in future when the country advances in social and scientific development and civilisation. Meanwhile, to be duly qualified for the post of inspector, a person must have charisma, knowledge and experience in the *Shari'ah* legal practice. We therefore consider fit for the post, lecturers of *Shari'ah* in the universities on part-time basis, retired Kadis on full-time appointment, and serving superior Kadis like the Grand Kadi and his deputy on casual basis. The inspectors should continue with the duty of transfer of cases from one court to another (of equal status) in the interest of justice, particularly in urban centres. They should also continue with the review of cases, especially in the rural areas where superior courts in which appeals should lie are located too far away, causing hardship to the rural populace. The three categories of suggested inspectors can arrange their inspection visits to the courts in a way that different inspectors will go to different courts at different times.

Transfer of cases from the High Court to the *Shari'ah* Court of Appeal and vice versa has caused too much row and tension, leading to the former court appointing assessors among the *alkalai* of Area Courts. It has been an age-long phenomenon as reflected in *Doninic Ogoja v. Adamawa Native Authority* (1958)³⁰ in which the issue was raised as to whether the appeal should go to the High Court or the Moslem Court of Appeal. The issue was caused by conflict in jurisdiction of the courts and this is discussed later.

Appeals often lay in Grades 'A' (Limited and Unlimited) Native and the Provincial Courts before lying further in either the High Court or the *Shari'ah* Court of Appeal. Later, Grades I and Upper Area Courts replaced the lower native courts in appellate jurisdiction. In recent times, all lower courts are being divested of appellate jurisdiction in some states.³¹

Diverse qualifications of the Area Court judges and their early counterparts of the Native Courts has led to divergent remuneration and imbalanced status, culminating into alleged corruption and disrepute for the judicial system at the lower level. The history of native tribunals in Nigeria 'is replete with instances of financial improprieties, political vendetta and farcical authoritarian'.³² We feel that the condition of service of such judges need to be improved in order to avoid direct or indirect forms of corruption. In fact, an Area Court judge may be tempted to be corrupt if he was owing his landlord some

months' house rent while the latter has a case pending in his court or when he was offered a free ride to the hospital in the vehicle of a party to a suit before him when his son was sick. Additionally, the psychological side effect of the heavier case loads often carried by the Area Courts than those of the Magistrates who earn better salaries with better conditions of service due to superior paper qualifications should be removed. Contrastingly, the case loads of the High Courts are heavier than those of the *Shari'ah* Courts of Appeal. Further still, not all Kadis of the Court are degree holders in the *Shari'ah*, yet they earn equal pay with equal benefits with the High Court judges! We did not call for more duties for the Magistrates as we called for the Kadis of the *Shari'ah* Courts of Appeal to justify their existence because of people's lack of confidence in the former; rather we call for better conditions of service for the Area Court Judges whose courts are more patronised by the people than the Magistrates'.

Personnel of the *Shari'ah* Courts of Appeal must be Muslims who possess sound working knowledge of Arabic. They must also be highly learned in *Shari'ah* Legal Practice. Hybrid compromised system must be avoided; hence there is the need to re-examine section. 218 of 1979 Constitution, by deleting the clause prescribing 'legal practice' in Nigeria from the qualification of *Shari'ah* Justice of the (Federal) Court of Appeal. A similar provision in section 211(3) for the Supreme Court should be considered while 'Personal' should be deleted from section 252 (1), (a) (i) and (ii) as done in all other sections where the word occurred in 'Islamic Personal Law'. Thereafter, qualified *Shari'ah* Justices must be appointed for the Supreme Court. If the government feels like retaining the clause specifying 'legal practice' qualification for the two most superior courts, *Shari'ah* School of Advocates should be established and the relevant sections of the constitution amended, distinguishing English legal practice from *Shari'ah* legal practice.

Concerning jurisdiction and law of the courts, 'area in which the defendant is ordinarily resident or in which he was at the time when the cause of action arose' and 'the state in which the court was established' were the respective territorial jurisdiction for the lower courts and the *Shari'ah* Court of Appeal. We observe that courts of *Shari'ah* jurisdiction must be established in every state of Nigeria so that justice may be obtained in a place where the offence is committed. Thus, Muslim indigenes of Northern States residing in the Southern States would not necessarily need to travel back to the North before obtaining justice in the Islamic way.

Jurisdiction *ex-personae* of the *Shari'ah* courts excludes certain categories of people like a non-Muslim or a non-native/foreigner in some cases except with express request to seek justice in such courts. In *Dominic Ogoja v. Adamawa Native Authority* (1958),³³ among the issues raised at the trial court were whether appeal should lie in the High Court or the Moslem Court of Appeal and whether the case was governed by 'Moslem Law'. The loopholes in the law have led to the nullification of many cases of Islamic subject matter even when the parties must have indicated their submission to the jurisdiction of the Islamic courts. Jurisdiction *ex-personae* of *Shari'ah* Court should therefore be worded in the laws of the states to be devoid of loopholes, and to cover all Muslim foreigners resident within the territorial jurisdiction of the courts. Whenever non-Muslims indicate their willingness to subject themselves to the jurisdiction of *Shari'ah* Courts at the first instance, appeals should not lie therefrom in the High Court but in the *Shari'ah* Court of Appeal.

On the jurisdiction over cases and matters, lower *Shari'ah* courts have both civil and criminal jurisdiction with certain limitations. Of recent, plans have been made to divest the courts of criminal jurisdiction. Such an exercise is undesirable for many reasons which include lack of confidence of the populace in the Magistrates' courts which are billed to take over the criminal jurisdiction and the technicalities of the English legal practice. As such, Area Courts should continue to exercise both civil and criminal jurisdiction. The only modification in this regard should be the revision of the amounts in the schedules to reflect the global inflationary trends. Each amount may be multiplied by four. On criminal jurisdiction, the penalties may be revised as suggested below, by which Islamic penalties may replace the Penal Code penalties. As regards the jurisdiction of *Shari'ah* Courts of Appeal which is too narrow, it is necessary to confer original jurisdiction upon them in the letters of their present appellate jurisdiction. Complementarily, they may exercise both original and appellate jurisdiction in additional civil matters like contract, sale, commercial transaction, land etc., and in criminal matters like theft, adultery, defamation etc. Section 242 (2) (e) of 1979 Constitution should therefore be amended on civil additional jurisdiction for the court and sections 242 (1) and 223(1) on the new suggested criminal jurisdiction. The constitution and laws should be clearly worded to avoid controversy on the jurisdiction of the courts as happened in *Iyan Katsina Ibrahim v. Katsina Native Authority* (1956)³⁴ where the argument ensued on the status of the Native Authority *vis-à-vis*

the government in respect of revenue and whether or not, and to what extent could the court exercise jurisdiction in the case.

The lower courts administered a variety of laws ranging from the orders of the Governor to the bye-laws of the Native Authorities, the native law and custom other than the *Shari'ah*, *Shari'ah* law as part of any of the above three, the Penal Code law, and any other codified laws (including English Law). Controversies arose on the applicable native law and custom, especially when it incorporated *Shari'ah* law. In some cases, the territorial native law and custom would be the *Shari'ah* while at the same time, the law binding between the parties to a suit would be their indigenous native law and custom. Conflict between territorial stipulations and what bind the parties which are both 'native law and custom' has adverse effects on the *Shari'ah* law in many respects. The inclusion of *Shari'ah* law in the native law and custom was therefore unfortunate. The British legal administrators considered *Urf* as a source of law of Islam in that regard, omitting its infinitesimal status. In fact, *Urf* is just a branch of *al-Ijtihad bi ar Ra'y* which is an auxiliary source of the *Shari'ah*. It is therefore necessary to remove *Shari'ah* law from the constituents of native law and custom and give it a befitting pragmatic status.

Similarly, law of administration in the lower *Shari'ah* courts of the Southern States (when established) should equally be called *Shari'ah* rather than making it part of customary laws. In the same direction, the dissolution of Christian marriages has been removed from the aegis of the Yoruba Customary Courts to English oriented (superior) courts.³⁵ That was done in recognition of the competence of the courts to handle Christian cases; and the incompetence of the Customary Courts to handle the same. There is therefore a need to allow the law governing a case of a Muslim by Islamic law, and not customary law or native law and custom.

Law of administration in *Shari'ah* Court of Appeal includes Maliki doctrine of Islamic law, *Shari'ah* Court of Appeal Law, Native Courts Law, as well as natural justice, equity and good conscience. These sets of law are Islamic in many respects, especially the first two. A clause, qualifying the Maliki doctrines of Islamic law that it should be applied as customarily interpreted in the locality, recognises the role *Urf* can play in determining *Shari'ah* legal principles and should therefore be retained. That notwithstanding, the applicable law should not be confined to the walls of only the Maliki doctrines. There must be room for flexibility with the application of at least

Takhayyur. It will be recalled that many writings of ‘Uthman dan Fodio and some of his lieutenants approved *Takhayyur*. In addition to that, the writer of *Tuhfah* has rebuked the appointment of a mere *Muqallid* as a judge as revealed earlier in this work. Therefore, to qualify for a judge, a person should preferably be a *Mujtahid*. The practice of *Takhayyur* is now common in the Muslim world. For instance, the High Court of Mecca upheld the view of Ibn Qayyim and neglected the popular views of the Hanbali School in *Abdul Qadir v. Suhan* (1376/1956)³⁶, a case in which the custody of a child, when the original custodian is travelling for a distance more than *Masafah al-Qasr* (which is about 75 kilometres), was involved.

The inclusion of ‘natural justice, equity and good conscience’ among the applicable laws in the *Shari‘ah* Court of Appeal has no basis in Islam. It was applied only in the English Courts to nullify many cases of Islamic subject matter including *Kano Native Authority v. Raphael N. Obiara* (1959), in which arguments were advanced on what were the requirements of natural justice and on what would it depend. We have been convinced through interviews and our experience in this research that the deletion of that ill-intentioned clause from the applicable laws in the *Shari‘ah* Courts of Appeal is absolutely necessary. It can be replaced with *al-Ijtihad bi ar-Ra’y*, derived from the divine sources of the *Shari‘ah* through *Takhayyur* or personal opinion based on the same divine sources after exhausting all relevant views of the *Salaf* and previous judgements.

To facilitate and make the exercise of criminal jurisdiction Islamic in the *Shari‘ah* lower and higher courts, penalties contained in the Penal Codes Law need be abolished. They should be replaced with the Islamic penalties. For instance, Fatal Accidents Law, Cap. 43 of 1963 Laws of Northern Nigeria has bearings with Islamic Penal Law. Reforms of such law and similar ones in the Penal code can be made and further applied by the courts of *Shari‘ah* jurisdiction. Finally, *Shari‘ah* Penal Law may need to be codified for application in Nigeria as done in many other Muslim and Islamic countries.

Practice and procedure in the lower and superior courts of *Shari‘ah* jurisdiction are Islamic except the (Federal) Court of Appeal where elements of English law have been intermittently applied to undermine the *Shari‘ah*. Area Courts hold sessions daily in the locations contained in the warrants that established them while the *Shari‘ah* Courts of Appeal hold theirs mostly in the state headquarters and complementarily in some selected towns of the respective states to which the Kadis travel on schedule. Officers of the Courts other than the Judges

and Kadis have the responsibility of guiding the people on how to register cases in the courts to the stage of hearing. Hearing procedure is purely Islamic in many respects. It has been codified in at least one state while the 1976 Area Courts Reform Committee has equally suggested a version for codification by all the states. Care must, however, be taken in giving *ex parte* judgement due to its delicacy under the *Sharī'ah*. Similarly, terms of setting arbitration panels in conformity with Qur'an 4:35 must be keenly watched. The courts must recognise the fact that judicial precedent is not fully approved by the *Sharī'ah*. It is only when a case at hand is completely relevant to another case earlier decided that the latter could be quoted in support of the former, and this seldom happens. The *Qadi* should, therefore, acquaint himself with the extent set for judicial precedent under the *Sharī'ah*. For instance, the High Court of Mekkah did not follow (blindly) its decision in 'Abdul Qadir v. Suhan (1376/1956) when deciding Bagazi v. 'Awwad (1380/1960)³⁸ on the same subject matter.³⁹

Legal representation was not allowed in the *Sharī'ah* lower and superior courts until 1985, after the ruling of the (Federal) Court of Appeal, Kaduna, in *Karimatu Yakubu and Alhaji Mahmoud Ndatsu v. Alhaji Yakubu Tafida Paiko and Alhaji Umaru Gwagwada* (1985). The case was earlier decided by Niger State *Sharī'ah* Court of Appeal but legal representation was disallowed on the ground that the representing legal practitioners were not qualified in the *Sharī'ah*. The Court of Appeal nullified the decision of the *Sharī'ah* Court below, relying on section 33 (13) (a) of 1979 Constitution. This development warrants either the deletion of that section from the constitution or immediate establishment of *Sharī'ah* College of Advocates. With the latter suggestion, the constitution will still need to be amended to make a distinction between *Sharī'ah* legal practice and English legal practice. Yet, there is a dire need for formulating codes of conduct for Nigerian lawyers in general, whether or not they are of English or *Sharī'ah* orientation. Such will forestall the high charges to their clients and minimise, if not totally eliminate, the delay and unnecessary adjournment of cases.

With the approval of Islamic Practice and Procedure for Islamic cases in the lower courts and the *Sharī'ah* Courts of Appeal, the evidence in them is mostly Islamic. It is worthy of note that the section of the Area Courts Civil Procedure Rules which allows for Islamic Practice and Procedure for Islamic cases has been omitted from the Rules of the (Federal) Court of Appeal and the Supreme Court. We hereby suggest its incorporation in both rules. Lack of such has resulted to the

nullification of many cases of Islamic subject matter like *Jibrin Kawu Dan Fari v. Kano Native Authority* (1959)⁴⁰ on evidence and *Ubi Yola v. Kano Native Authority* (1961)⁴¹ on hearing procedure.

Finally, inadequate funding of the courts can adversely affect their practice and procedure. The situation in which parties to the suits are charged to produce stationery items for the production of judgements for them undermines the status of the courts. Moreover, the buildings in which the Area Courts and most *Shari'ah* Courts of Appeal carry out their daily judicial business are deplorable. People often measure the status of someone with the premises of his activities. The side effect of such poor buildings for courts of *Shari'ah* jurisdiction is the feeling of inferiority by their judges and justices. The buildings need to be improved like that of Kano *Shari'ah* Court of Appeal. A great deal has changed for the better over the years but there is always room for improvement (Editor).

Meanwhile, the few recommendations and suggestions offered in this section are meant for serious consideration on a temporary measure. We believe that reforms should neither be hastily nor drastically made, particularly where human beings are involved as operators; hence we offered such suggestions as a stepping stone towards the actual remedies we believe can totally put the Nigerian judiciary in a prosperous and more viable position. For any constitution to be durable and acceptable by the majority of the Nigerian populace, it must recognise *Shari'ah* legal practice for the Muslims, the English legal system for the Christians and the Traditional law for the remaining others. *Shari'ah* law *per se* is not meant to oppress people,⁴² it is the societal phenomena that may tempt some of its operators to apply it negatively. Justice Bashir Sambo opined that *Shari'ah* law deals with human beings and their welfare, and that its operators are versed in, and well informed about it, hence the difficulty to get it easily abrogated by the British colonisers. In view of the importance of *Shari'ah* legal practice in Nigeria, and in recognition of the fact that many other laws are operated along with it, we make the following recommendations for the purpose of creating peace and harmony in the Nigerian judiciary on the one hand, and the restoration, maintenance, and prevalence of peace and tranquility in the Nigerian society at large on the other hand, so that the citizens may have rest of mind to contribute maximally to the progress of the nation. The recommendations are for long term solution due to the religious crises and tension in the country. They may still be implemented on a short term basis if the religious crises and tension are put to an end within the shortest time possible.

6.2 Recommendations

The following recommendations focus on the organisational structure of the courts, their jurisdiction and laws, their practice and procedure, and other miscellaneous items among which are the provisions of *Shari'ah* legal training and areas for further research in this discipline.

6.2.1 Organisational Structure of the Courts

1. Religious adherence of the populace should be strongly considered in the establishment of courts. Many people (including Lord Lugard) and panels of inquiry (including Brooke Commission) have recognised the importance of religion in this regard. The present tension and crisis in the form of competition between the English legal system and others (including *Shari'ah* legal system) have vindicated the earlier findings of a parallel legal system for Nigeria. Indeed, the persistence and consistence of Nigerian Muslims in their requests for the application of *Shari'ah* in the South and their resentment of 'native law and custom' as incorporating *Shari'ah* law have pointed to the need for a parallel legal system. Its adoption will solve quite a number of problems like the Northern indigenous Muslims domiciled in the South travelling back home to obtain justice and the tussle for supremacy between the present Grand Kadis and the Chief Judges of the States. In fact, the Judicial Service Committee should be retained for the establishment and control of courts but the Governor of the State and the President of the Federal Republic of Nigeria should take over its chairmanship as earlier suggested.

Thus, both the Grand Kadi and the Chief Judge will assume parallel equal status. In establishing the courts, items for consideration should include population density or sparsity, public morality, mobility and easy access to courts, and religious adherence. There is nothing wrong in having, for instance, six traditional courts, ten *Shari'ah* courts, and four English courts in a town, each administering justice with its religious law in its peculiar system since no adherent of one religion will be forced to seek justice in a court other than that of his faith in which he has confidence. By this arrangement problems like having 'alien' courts in one locality as in Kwara State, where the 70 per cent Muslim population have a small number of *Shari'ah* judges, will equally be solved. However, the laws establishing such courts and the

constitution must be clearly worded to avoid future controversies.

2. Adherents of each religion should be appointed judges of their courts. The age of majority which is around twenty-one years may be considered for a *Shari'ah* court judge of the lowest grade while we have reservations in stipulating the age of retirement. We feel that the more years an officer puts in a job, the more experienced he becomes until the law of diminishing returns creeps in, and this will vary from individual to individual.
3. The constitution of each court should follow the approved pattern in its system among the three parallel sections. In *Shari'ah* courts, a single judge shall constitute the court.
4. There can still be a division for inspection of courts in the judiciary, particularly for review or transfer of cases as earlier suggested. But such will depend on the level of civilisation and advancement of the country. In fact, the parallel legal system will solve the problem of forcefully retaining Islamic cases by the High Court section which often led it to appoint assessors from the *alkalai* of the lower courts. No case would need to be transferred from Islamic Court to non-Islamic Court and vice versa.
5. In view of the failure of, and confusion caused by, the created division for *Shari'ah* in the (Federal) Court of Appeal, we feel more convinced that the parallel legal system is much more desirable. In the new parallel system, we recommend each court to serve as appellate court for the one immediately below it. Such shall be for each of the three sections of the parallel court system. For example, Grade Two *Shari'ah* Court will serve as appeal court for Grade Three *Shari'ah* Court which is immediately below it and one for two while the Supreme Court will serve for one. Similarly, the same system of appeal will be adopted by the traditional court section, and the English Court section on parallel basis.
6. The status, salary, qualification and duties of each judge and staff of the various sections must be harmonised in such a way that none will look superior to the other (grade by grade). For instance, if the qualification of the lowest *Shari'ah* Court judge is a degree in *Shari'ah*, an equivalent qualification should be prescribed for a judge of the lowest English and traditional courts respectively so that they will all have the same status, earn equal

salary and have identical responsibilities, though in different courts of orientation. We recommend very strongly that every *Shari'ah* court judge must be sound in Arabic which is a necessary tool for mastery of *Shari'ah* legal manuals.

Table XXXII: Recommended Grades of Court, Qualification of Judges, Years of Experience, and Location of Courts

Grade of Court	Qualification of Judges	Years of Judicial Experience for the Judges at the Bar or the Bench	Location of Courts
III	Degree in the relevant religious laws and general matters.	Fresh graduate	Federal constituency in each state.
II	Degree in the relevant laws above.	5 years	Senatorial district in each state.
I	Degree in the relevant laws above.	10 years	State Headquarters
Supreme	Degree in the relevant laws above.	15 years	Federal Capital

A judge who starts with a university degree in the lowest court can gain promotion every five years (with satisfactory service) till he gets to the Supreme Court in the long run. He can however go for in-service course to obtain higher degree(s).

7. Distribution of courts may follow population density or land sparsity by which the lowest grade (e.g. Grade III) will serve either 30,000 people of the same religious group or 484 sq. kilometres which is about a radius of twenty-two kilometres. Thus, for the three sets of courts to be established in a place on equal basis, the population may be either 90,000 people or the land area triples the 484 sq. kilometres. In other words, the population of religious adherents will determine the ratio and number of court each group will have in the first instance. In the second instance, four courts each, of the Grade III, may feed each Grade II courts in appellate jurisdiction. Furthermore, five Grade II court (each serving a religious group) can feed each Grade I court in appellate jurisdiction. Lastly, on the organisational structure of the courts, the laws and the constitution must be carefully drafted to avoid generalisation as contained in section 258 (i) of the 1979 Constitution. Thus, laws should refer to the separate sections without further

link or connection to any other section in the parallel system on religious basis.

6.2.2 Jurisdiction and Law

1. Courts should be made available for every group of the populace everywhere in the country so that justice can be obtained where the offence was committed or in the area in which the defendant is ordinarily resident or in which he was at the time when the cause of action arose.
2. Each court should have both civil and criminal jurisdiction. There should be no fear of corruption and inefficiency as long as the judges possess proper qualification and have adequate remuneration. Both the lower and the superior courts should have original jurisdiction. All the courts except the lowest grade will have appellate jurisdiction. It is worthy of note that some matters cut across religious adherence like offences against the Railway Corporation, National Electric Power Authority, Ports Authority, Airways and a host of others. We hereby recommend that each set of courts should still exercise its civil and criminal jurisdiction *in toto* but additionally have common jurisdiction in such general matters. Training of judges of all categories should cover all general matters in addition to what their respective religious laws prescribe while the laws on such matters must be jointly formulated by the adherents of the three religions. The following table is a mere guide to the jurisdiction over cases and matters.

Table XXXIII: A Guide to Jurisdiction of Courts Over Cases and Matters

Grade of Court	Civil Jurisdiction	Criminal Jurisdiction
III	₦1 – ₦50,000	According to each of the three sections on religious basis plus general matters of limited jurisdiction.
II	₦50,001 – ₦1 million	Original and appellate jurisdiction plus advanced jurisdiction in relation to Grade III.
I	₦1 million – ₦50 million	Similar but more advanced than above.
Supreme	Above ₦50 million	Similar but more advanced than above.

The above is a mere illustration; details of the jurisdiction can be worked out later by experts in accordance with the economic situation of the country. It should be noted that each grade of court in a section should have identical jurisdiction with its counterpart in another section in order to have equal power and maintain equal status for the courts of the same grade. Each court should also have appellate jurisdiction from the court below, in addition to its original jurisdiction.

3. In this parallel legal system, the law of administration in each of the three sections will differ, except in the laws governing the general matters like traffic and others earlier noted. Thus, there is still unity in diversity. Courts of a section will administer the law peculiar to them and additionally apply the general matters law. As such, the general laws will cut across all the courts and judges of every court must be learned in them. Such laws must be codified to avoid any misinterpretation or application. As regards the codification of *Shari'ah* law, we believe that principles of the criminal and civil substantive as well as procedural laws must be codified to guide the legal practitioners. Details may be avoided in the codification but principles and guides to arrive at suitable specifications should be provided.

6.2.3 Practice and Procedure

1. Practice and procedure of each section should be adhered to strictly. Islamic cases should be heard according to *Shari'ah* law procedure in order to avoid confusion which characterised the procedure of Islamic cases in the present (Federal) Court of Appeal. The only area of uniform practice and procedure among all the courts, regardless of religious section, is in matters of general application like the Ports Authority and its like. That notwithstanding, rules of courts must be made by the head of each section for his courts while the three sectional heads will jointly make rules of general application on general common matters, like the Airways and others earlier mentioned.
2. Head of each section should control it and determine where sessions should hold.
3. *Shari'ah* Practice and Procedure should avoid technicalities which characterise the present English system and which made it unsuitable for application in Nigeria. Care must be taken, and practitioners should

guard against Westernising areas that are amenable or related to Western elements or provisions like *ex-parte* judgement and reliance on judicial precedent.

4. Only lawyers learned in each section and called to its bar should be allowed to practise in its courts. This will forestall the kind of ugly incident in Niger State *Shari'ah* Court of Appeal in the case of *Karimatu Yakubu and Alhaji Yakubu Tafida Paiko* and its subsequent effects after the judgement of the (Federal) Court of Appeal. Indeed, there is need for the establishment of *Shari'ah* College of Advocates and thereafter, code of conduct must be provided for legal practitioners to curb their atrocities by omission or commission.
5. There must be strict adherence to the Law of Evidence of each section. Such will put a stop to the un-Islamic provision for closure of list of witnesses at a particular time which is provided in the present law of procedure of some courts of *Shari'ah* jurisdiction. In fact, among the advantages of a parallel legal system is the putting to an end, the incessant quashing or nullification of cases of Islamic subject with the application of English law by superior courts of English orientation through either the repugnancy clauses or judicial precedents. Examples of such cases include *Jalo Guri and another v. Hadejia Native Authority* (1959)⁴³ in which Islamic law was regarded repugnant to natural justice, equity and good conscience; *Kawule Dan Tukur Indabo v. Kano Native Authority* (1957),⁴⁴ where the status of Islamic Criminal Law of Evidence was discussed; and *Tsofo Gubba v. Gwandu Native Authority*⁴⁵ which reveals conflict of law in its true perspective – just to mention a few.

6.2.4 Other Matters

1. The need for production of *Shari'ah* legal practitioners in Nigeria cannot be overemphasized. At present, the number of *Shari'ah* law graduates from the Nigerian universities is small as compared to what the nation needs. Yet they are graduates of comparative law rather than *Shari'ah* law *per se* and some non-Muslims among them can lay claim to be experts in *Shari'ah* simply because they offered it as a subsidiary course, whereas they lack deep knowledge of original Arabic sources. Should such non-Muslims seek appointment as *Shari'ah* Court judges, what type of confidence will the Muslim litigants have in them? Hence, the need for a parallel legal system in which people of faith in each religion

will administer its law. The curriculum of the Nigerian Faculties of law offering the *Shari'ah* should be revised, with all *Shari'ah* law lecturers participating and contributing to the revision. The universities may not have the same syllabus due to peculiar areas of specialisation of the available lecturers in the respective institutions, but the programmes may look identical with deep provision for all facets of *Shari'ah* law. In view of the availability of general matters for common application by the courts, regardless of religious adherence, the amount of *Shari'ah* in the programme may not be less than 70 per cent, with the laws of general application taking the residue of 30 per cent. Thus, the Law School should be reorganised with special sections for the three laws operating in the country and a section for general matters.

2. Many problems are associated with *Shari'ah* Law Reporting. Some *Shari'ah* Courts of Appeal feel shy of sending cases to the publishers of the reports while the global economic recession has affected monetary allocation to the universities by the National Universities Commission thereby limiting the budget of all academic departments. We feel that the *Shari'ah* Courts of superior record should cooperate with publishers of the Law Reports because of their importance in learning the law. Philanthropists among individuals, government agencies and private companies should also sponsor the publication of the Reports for the benefit of *Shari'ah* law practitioners in the country.
3. This work is so comprehensive and wide that there was no better approach than a historical one. The analytical aspect of the work cuts across various subject matters of the *Shari'ah*. As such, for in-depth analytical study of some selected matters tried in the *Shari'ah* Courts of Appeal we recommend:
 - i. administration of deceased Muslims' property,
 - ii. divorce (including *Khuṭ'*),
 - iii. application of evidence law of Islam,
 - iv. combination of law of paternity, custody and welfare of children; and a few others in which there are abundant materials for further research in this area of specialisation as revealed in Table XII.

Similarly, causes and effects of religious crises and tension in Nigeria on the *Shari'ah* legal practice, particularly in the Southern States of the country, is equally viable for further research.

Lastly, we hope that this work will be beneficial to the Federal Government and State Governments in their plans towards a meaningful administration of justice in the country at large and in the states in particular. Similarly, legal practitioners in general and those with *Shari'ah* specialisation among them in particular, both at the Bar and the Bench, may have one area of interest or another in this work. In addition, lecturers of *Shari'ah* in Nigerian universities offering the course will definitely realise one or two beneficial points to their profession in this work. Furthermore, students of *Shari'ah* law and research fellows may have been guided to some extent on further areas of research in this field with particular reference to the Nigerian scene. Lastly, we pray the Almighty Allah makes the work useful not only to the specialists in the *Shari'ah* who may come across it, but also to any other non-specialist in the area who may have the interest of peace and tranquility of Nigeria at heart. A healthy judiciary will promote peace and with peace the nation will make progress. With the publication of this research work, the yearnings of the author has been realised. May Allah bless his soul (Editor).

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10. Minutes of the Meeting of the Committee on Qualification of Area Court Judges, Held at the Headquarters of Niger State Judiciary, Minna, on 10 August 1985 p. 1.
11. *Ibid.* p. 2.
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19. *Ibid.* p. 74 n. 52.
20. The Grand Kadis, similarly, expressed their dislike for putting the Area Courts section under their control for no other reason than the alleged corruption of its officers which may eventually tarnish the image of the *Shari'ah* Courts of Appeal (Interview with Justice Yahya Kanem, Grand Kadi of Plateau State, Jos, on 27/2/1986).
21. Interview with Justice (Alh.) Muazu Aliyu, Grand Kadi of Kaduna State on 2 February 1986.
22. Interview with Justice (Dr) Hassan Ibrahim Gwarzo, Grand Kadi of Kano State, on 24 February 1986.
23. Interview with Justice Abdulkadir Orire, Grand Kadi of Kwara State, on March 22, 1986.
24. Interview with Justice Bashir Sambo, Grand Kadi of Abuja, on 7 April 1986.
25. Interview with Justice Haliru Binji, Grand Kadi of Sokoto State on 9 April 1986.
26. *The 1979 Constitution of the Federal Republic of Nigeria* s. 243.
27. *Ibid.* s. 226(a).
28. *Ibid.* s. 214.
29. *Ibid.* s. 238
30. N.R.N.L.R. 35.
31. Examples are Plateau State where the Courts have been totally divested of appellate jurisdiction and Kwara State where they have been partially divested.
32. *The Punch*. Lagos, Nigeria 8/9/1987 p.4
33. N.R.N.L.R. 35.

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35. W.R.L.N. Cap. 31: Second Schedule.
36. Case No. 53, Vol. 46.
37. 4 F.S.C. 226.
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39. Muhammad Ibrahim Ahmad °Ali and °Abd al-Wahhab Abu Sulaiman, *op cit* pp.14-15.
40. N.R.N.L.R. 71.
41. N.L.R. 549.
42. This is the view of Justice Bashir Sambo in an interview with him *op cit*.
43. N.R.N.L.R. 98 and 4 F.S.C. 44.
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Meeting of Committee on Qualification of Area Court Judges,
held at the Headquarters of Niger State Judiciary, Minna, on
10 August 1985.

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Wednesday, 3 June 1987
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Wednesday, 22 April 1987

- Wednesday, 8 July 1987
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 Thursday, 13 August 1987
 8. *Sunday Herald*, Ilorin (SH)
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 9. *Sunday New Nigerian*, Kaduna (SNN)
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 10. *Sunday Tribune*, Ibadan (ST)
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 12. *The Herald*, Ilorin (TH)
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 Saturday, 24 January 1987
 Monday, 16 March 1987
 Monday, 8 June 1987
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 Wednesday, 20 May 1987
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 Friday, 28 August 1987
 Tuesday, 8 September 1987
 14. *Vanguard*, Lagos (VG)
 Friday, 2 January 1987

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List of Informants

Place of the Interview	Name of the Informant	His/Her Post	Date of the Interview
Abuja	Alhaji Bashir Sambo	Grand Kadi of Abuja	7/4/86
Bauchi	Alhaji Abdulmalik Bappa Mahmud	Grand Kadi of Bauchi State	28/2/86
	Alhaji Abdullahi Y. Marafa	Chief Registrar of Bauchi State <i>Shari'ah</i> Court of Appeal	27/2/86
	Alhaji Sa'adu Gadau	Chief Inspector of Area Courts – Bauchi State	27/2/86
	Mrs Z.Y. Aliyu	Chief Registrar, High Court of Bauchi State	27/2/86
Ibadan	Justice Ibrahim Kolapo Gambari	Justice of the (Federal) Court of Appeal (JCA)	16/3/87
	Dr D.O. Shitu Noibi	Head, Dept. of Arabic and Islamic Studies, University of Ibadan	16/3/87
Ilorin	Alhaji Abdulkadir Orire	Grand Kadi of Kwara State	22/3/86
	Alhaji Abdulkadir Imam Fulani	Chief Registrar of <i>Shari'ah</i> Court of Appeal – Kwara State	22/4/86
	Alhaji Yakubu Momoh	Chief Inspector of Area Courts – Kwara State.	7/3/86
	Alhaji Oba Mahmud	Principal Inspector of Area Courts – Kwara State.	19/11/86
Jos	Alhaji Yahya Kanem	Grand Kadi of Benue/Plateau States	27/2/86
	Alhaji Muhammadu Yusuf	Chief Inspector of Area Courts – Plateau State	28/2/86
	Mallam Ilyasu B. Haruna	Registrar – <i>Shari'ah</i> Court of Appeal Benue/Plateau States	27/2/86
	Mr L.C. Dakyen	Chief Registrar, High Court of Plateau State.	28/2/86
Kaduna	Shaykh Abubakar Mahmud Gumi	Grand Kadi of the Defunct Northern Nigeria.	6/4/86
	Alhaji Ahmed Dodo Ibrahim	Chief Registrar of Kaduna State	17/2/86
	Alhaji Muazu Aliyu	<i>Shari'ah</i> Court of Appeal.	11/3/86
		Grand Kadi of Kaduna State.	22/10/86
			18/2/86
			19/2/86
			12/3/86
			23/10/86

	Alhaji Atiku Yusuf Lere Alhaji Yusuf Ibrahim Abdulkadir Ishaku Mr Okoi O. Ubi	Chief Inspector of Area Courts, Kaduna State. Deputy Chief Registrar (Federal) Court of Appeal. Higher Registrar (Federal) Court of Appeal. P.R.O.– Kaduna State Police Command.	19/2/86 21/10/86 23/10/86 23/10/86 19/2/86
Kano	Dr Hasan Ibrahim Gwarzo Alhaji Yahya Othman Alhaji Abubakar S. Tahir Mallam Garba Abubakar Madungurum Alhaji Abdu Aboki Mr Abdulkadir Zubair	Grand Kadi of Kano State Chief Registrar of Kano State <i>Shari'ah</i> Court of Appeal. Chief Inspector of Area Courts, Kano State. Principal Inspector of Area Courts, Kano State. Chief Registrar, High Court of Kano State. Lecturer, Faculty of Law, Bayero University.	24/2/86 10/3/86 24/2/86 10/3/86 24/10/86 25/2/86 25/2/86 25/2/86 26/2/86
Lagos	Justice Alfa Belgore	Justice of the Supreme Court	9/3/86
Maiduguri	Alhaji Shettima Muhammad Abani Alhaji Musa Kida Alhaji Manu Musa Dumoulwa Alhaji Abdullahi Dala Mutai Alhaji Mala Shettima Mr C.T. Yerima Ma'aji Isa Shani Dr Ihinger	Kadi of Borno State <i>Shari'ah</i> Court of Appeal. Kadi of Borno State <i>Shari'ah</i> Court of Appeal. Ag. Chief Registrar of Borno State <i>Shari'ah</i> Court of Appeal. Chief Inspector of Area Courts, Borno State. Deputy Chief Inspector of Area Courts, Borno State. Principal Registrar (Litigations) High Court of Borno State. Head, Dept. of <i>Shari'ah</i> , University of Maiduguri. Lecturer, Dept. of <i>Shari'ah</i> , University of Maiduguri.	6/3/86 6/3/86 6/3/86 5/3/86 5/3/86 5/3/86 5/3/86 5/3/86 6/3/86
Sokoto	Alhaji Haliru Binji Shaykh Ahmed Lemu Alhaji Abubakar Atiku Zagga Alhaji Muhammad Haliru Binji Justice U.A. Kalgo Hajia Fati Yusuf Imam	Grand Kadi of Sokoto State. Grand Kadi of Niger State. Chief Registrar of Sokoto State <i>Shari'ah</i> Court of Appeal. Chief Inspector of Area Courts, Sokoto State. Chief Judge, Sokoto State Chief Registrar, High Court of Sokoto State.	4/4/86 7/4/86 9/4/86 8/4/86 4/4/86 9/4/86 4/4/86 9/4/86 9/4/86

	Dr S.K. Rashid	Head, Dept. of Islamic Law, University of Sokoto.	9/4/86
Minna	Shaykh Ahmed Lemu	Grand Kadi of Niger State	24/10/86
	Alhaji Yunusa Kenchi Agaie	Kadi of Niger State <i>Shari'ah</i>	7/4/86
	Alhaji Abdulkadir Salawu	Court of Appeal.	24/10/86
	Alhaji Usman B. Aliyu	Chief Registrar of Niger State <i>Shari'ah</i> Court of Appeal. Chief Inspector of Area Courts, Niger State.	7/4/86 24/10/86
Yola	Alhaji Abubakar Mahmud Yola	Grand Kadi of Gongola State	3/3/86
	Alhaji Ibrahim Babbawa	Chief Registrar of Gongola State <i>Shari'ah</i> Court of Appeal.	3/3/86
	Mallam Umar Ardo	Ag. Chief Inspector of Area Courts, Gongola State	3/3/86
Zaria	Prof. A.R.I. Doi	Director, Centre of Islamic Legal Studies, Ahmadu Bello University.	21/2/86
	Dr Musa Yakubu	Head, Dept. of <i>Shari'ah</i> , A.B.U.	22/10/86

K. Questionnaire

State	Officer	Information Required on	Remarks
Bauchi	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrates <i>Shari'ah</i> Courts of Appeal Area Courts.	– Responded –
Benue	1. CR – High Courts 2. C.I.A.C.	High Courts/Magistrates Area Courts	Responded Responded
Borno	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrates <i>Shari'ah</i> Court of Appeal Area Courts	Responded – Responded
Gongola	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrate <i>Shari'ah</i> Court of Appeal Area Courts	Responded Responded –
Kaduna	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrates <i>Shari'ah</i> Court of Appeal Area Courts	Responded Responded –
Kano	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrates <i>Shari'ah</i> Court of Appeal Area Courts	Responded Responded Responded
Kwara	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrates <i>Shari'ah</i> Court of Appeal Area Courts	Responded Responded Responded
Niger	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrates <i>Shari'ah</i> Court of Appeal Area Courts	Responded Responded Responded
Plateau	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrates <i>Shari'ah</i> Court of Appeal Area Courts	– Responded –
Sokoto	1. CR – High Courts 2. CR – SCA 3. C.I.A.C.	High Courts/Magistrates <i>Shari'ah</i> Court of Appeal Area Courts	– Responded –

CR – Chief Registrar
S.C.A. – *Shari'ah* Court of Appeal
C.I.A.C. – Chief Inspector of Area Courts.

- L. Unpublished Addresses, Lectures, Monographs and Papers**
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- Kolo, K.M.** 'An Address delivered at the first Appeal Session for the year 1986', (Kolo, FAS – 1986).
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- Mahmud, Abdulmalik Bappa.** 'Brief History of *Shari'ah* in the Defunct Northern Nigeria,' Janaury 1986.
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Yusuf, A.B. 'Legal Pluralism in the Northern States of Nigeria: Conflict of Laws in a Multi-Ethnic Environment', Unpublished Ph.D. Dissertation, State University of New York, Buffalo, 1976.

Addendum

During the period of typing this work for final submission, another book relevant to it was published: *Islamic Law in Nigeria – Application and Teaching*. It contains papers presented at a Workshop on the Teaching of Islamic Law in Nigeria, held at the University of Sokoto on 1 and 2 June 1983. It was edited by Syed Khalid Rashid, Head, Department of Islamic Law, University of Sokoto. We discovered that the book concentrates on ‘teaching’ more than ‘practice’. Out of the 309 pages of the book which are divided into three parts: 1– Practice, 2– Teaching and 3 – Appendices, 76 pages are devoted to *Shari’ah* legal practice, 122 pages to *Shari’ah* legal education, and 98 pages to the Appendices. In all, there are 18 papers contributed: five on *Shari’ah* practice and thirteen on teaching problems. Out of the five contributions on the practice, two are devoted to the Sokoto Jihad leaders while the remaining three are largely on current issues. Two of those three were culled from the *Journal of Islamic and Comparative Law*, to which we already had access, and one of which is already reflected in this thesis. On the whole, the contents of the book do not affect the validity of the points raised in this work.

We are happy to note the continued efforts of knowledgeable and erudite scholars in calling attention to the wider need for, and essence of, the *Shari’ah* in Nigeria. For example, we appreciate the submission of Dr S.K. Rashid on pages 99 to 102 of the book and note with delight that this work has satisfied, to a large extent, his call for the production of teaching materials in Islamic law in Nigeria. In fact, this work can be aptly classified under Volume I of Category (b) of such teaching materials envisaged by Dr Rashid (Page 101 of the book refers). The struggle continues.

Appendices

Appendix I

Shehus of Borno: 1814 – 1937 CE

- 1. Shehu Muhammad al-Amin Al-Kanemi (1814-1835)**
- 2. Shehu Umar (1835-1880)**
- 3. Shehu Bukar (1880-1884)**
- 4. Shehu Ibrahim (1884-1885)**
- 5. Shehu Hashimi (1885-1893)**
- 6. Shehu Kyari (1893)**
- 7. Shehu Sanda Wuduroom (1893)**
- 8. Shehu Umar Sanda (1900-1901)**
- 9. Shehu Bukar Garbai (1901-1922)**
- 10. Shehu Umar Sanda (1922-1937)**
- 11. Shehu Sanda (1937)**

**Culled from DOI, A.I. *Islam in Nigeria* Zaria:
Gaskiya Corporation, 1984 p. 61**

Appendix II

S.S.L.N. NO. 3 OF 1980

Area Courts (Civil Procedure) (Amendment) Rules, 1980

1. When the parties appear before the court the judge must treat them on equal terms in seating, talking, hearing and in paying attention to them. There must be no discrimination regarding religion or position in life. The judge shall ask the plaintiff to state his claim. The claim must be realistic and unambiguous. If the subject matter of the claim is land, the plaintiff must mention its boundaries and its location. If it is money, he must tell the amount. If it involves animals he must mention them numerically and their descriptions. If it is something of money value he must mention the estimated value and if possible the object should be brought before the court. If the claim is not realistic in nature and if without substance, the judge should dismiss the case. If the claim, however, is not explanatory, the judge shall require the defendant to state what he knows about it. If afterwards it becomes clear that there is no definite claim to answer, the judge shall dismiss the plaintiff's claim.

2. When the plaintiff states his claim, the judge shall ask the defendant to give a reply to the plaintiff's claim. The defendant may admit either in whole or in part that he is civilly liable to the action. The defendant may also deny liability.

3. a. If the defendant admits liability, the judge shall enter judgement in favour of the plaintiff; provided that the defendant is an adult person whose admission is acceptable under the Islamic law, i.e. he is not subject to any disqualification.

3. b. If the defendant keeps mute, the judge may try to get him to say something in answer to the claim. If the judge fails to get him to talk his silence may be construed as an admission of the claim and judgement shall be entered against him. The plaintiff shall not be made to take an Oath in such circumstances.

4. Where the defendant denies the plaintiff's claim the judge shall determine the type of claim brought before him in order to decide who in fact, is the plaintiff (Mudda'i) and who is the defendant (Muddah'an alaihi) between the parties, so as to know on whom the burden of proof lies.

A party who cannot be helped by nature of his originality or custom is normally regarded as the plaintiff. Provided that in claims having connection with property or valuables, a house or a farmland; consummation of marriage so that a wife could qualify for full dowry; a divorce suit and dispute on child affinity which does not involve inheritance, the judge shall consider the nature of such claims, in order to assess which right may be established and which may not be by taking an oath.

5. In cases where the defendant denies liability, after the judge has determined who is a plaintiff and who is a defendant between the parties, the judge shall ask the plaintiff to produce evidence in support of his claim. If the plaintiff produces his witnesses the judge shall order them to be brought into open court one by one. He shall ask the first witness to state what he knows about the dispute between the two parties. If he does not testify anything the judge may discharge him. But if the witness gives evidence which supports the plaintiff's claim the defendant shall be allowed to cross-examine him. The judge shall allow a witness to defend himself against a challenge which may result in discrediting him or his evidence. If the defendant succeeds in discrediting the evidence given, that evidence shall be discarded. But if he fails to succeed in discrediting the evidence, that evidence shall stand. The judge shall treat all other witnesses for the plaintiff in the same manner. The judge shall allow witnesses in all cases to be cross-examined. Any judgement obtained in which a witness, evidence is not cross-examined shall be void. Provided that witnesses called to discredit evidence given by another witness shall not be subject to cross-examination.

Examples of grounds for discrediting evidence are family affinity of the witness with the party on behalf of whom the testimony is given; marriage connections; allegation that a witness may as a result of giving evidence obtain some benefit or that he may remove some defects or loss from himself or that the witness is an enemy to a person against whom he has given the testimony and such other instances that can disqualify a witness from giving evidence under the Islamic Law.

Two witnesses shall be produced to discredit the testimony given by another witness. In the same way as a witness called to discredit the evidence of another witness, shall not be cross-examined, so also are the witnesses summoned by the judge himself to witness a confession made by the parties in open court not to be cross-examined. The witnesses sent by the judge to witness the total Oath taking and the witnesses sent by the judge to ascertain the boundaries of a piece of land on

which evidence has been given by some other witness or witnesses and the like shall also not be cross-examined.

6. If an expert gives evidence in support of a claim either about a document or a thing the evidence shall be admissible under the Islamic Law. Such a piece of evidence, if given on a document, the document itself must be produced before the Court. No evidence can be given on a document without the production of the document before the court. The expert can give evidence on any matter orally before the court. Two experts may be produced to give evidence on a subject matter in dispute. The general accepted procedure, however, is to call one expert. Any fit and proper person including a non-Moslem may be called to give expert evidence. Where the expert cannot present himself physically before the court due to either ill health or for any strong reason which would make it impossible for him to appear in person, the report on the matter shall be admitted in evidence by the court. The evidence of an expert can be challenged through cross-examination as to the extent of the expert's knowledge on the matter he has reported on. The expert can also be impeached that he has not given truthful testimony.

7. The judge shall give judgement in favour of the plaintiff if the judge is satisfied that the plaintiff has furnished him with sufficient evidence to support his claim, that is to say, he has produced two unimpeachable male witnesses or one male and two female witnesses or only two female witnesses in a matter which women have peculiar knowledge; for example, evidence on a child alleged to have been born alive. As a general rule no court shall base its decision on the evidence of one single female witness.

8. If the evidence given in favour of the plaintiff does not satisfy the full requirements of the Islamic Law, for example, in cases of dispute on a property where two witnesses are required, but only one gives evidence, the judge shall require him to take an Oath in order to satisfy the requirement of the law. If the plaintiff agrees and takes an Oath the judge shall enter judgement in his favour. If he refuses to take an Oath, the judge shall request the defendant to do so. If the defendant takes the Oath the plaintiff's claim shall be dismissed. If, however, the defendant himself refuses to take the Oath the judge shall enter judgement in the plaintiff's favour. (According to a maxim in Islamic Civil Procedure, whenever a litigant is asked to take an Oath and if he refuses, the judge shall ask his opponent to take the Oath in order to establish his case, or

absolve himself. If he too declines to take the Oath, the act of refusal by the opponent shall be construed as an admission by him of the first litigant's claim).

9. If the plaintiff produces no credible witness to support his claim or he informs the court that he has no witnesses to produce in order to testify on his behalf, the judge shall ask the defendant to take an Oath in order to rebut the claim. If he takes an Oath he will be discharged and the claim of the plaintiff shall be dismissed. If, however, the defendant refuses to take an Oath the judge shall offer the Oath taking to the plaintiff, and if the plaintiff takes the Oath judgement shall be entered in his favour. If the plaintiff declines to take the Oath after it has been offered to him that will be the end of his case and the claim shall be dismissed.

10. a. Where the judge observes that each one of the opposing parties can be taken to be a plaintiff by the nature of the litigation, e.g. (a) where each one of them claims that he owns the subject matter in dispute, e.g. a house, a farm, a piece of land, animals, clothings and house belongings which are suitable for the use of both male and female, in such a situation, the judge shall look and see in whose possession is the subject matter in dispute. Is it in the parties' possession jointly, or in the possession of an independent person or in the possession of none of them. In all these circumstances the judge shall require each one of the litigants to produce his evidence. Anyone of them who can support his claim by evidence shall be given judgement in his favour and the whole subject matter in dispute shall be given to him. The judge shall dismiss the claim of any party who fails to support his claim with evidence.

b. Where both litigants support their claim with satisfactory evidence, the judge shall test the weight to be given to the evidence of each witness by finding which one of the parties' witnesses have given a more credible evidence. The judge will require that party to take an Oath as to the truth of his claim and then give judgement in his favour. A factor which is determined in establishing the evidence which carries more weight is the consideration of length of history in which a witness knows the subject matter. The number of witnesses has no bearing to the weight to be attached to the evidence.

c. Where the judge tests the weight to be given to the evidence of each party and finds the weight of their evidence to be equal, and none has more weight than the other in terms of credibility, in such a case, their evidence will have to be

discarded completely. They will be regarded as if they have told the judge at the beginning that they could not produce witnesses. In these two situations where the weight of evidence is proportionately the same, and where from the start each one of the parties cannot produce a witness, the judge shall find out which of the parties in dispute is in possession of the subject matter, and give more consideration to that party. It can serve as cogent evidence for a party according to Islamic principles of law, if at the time of the dispute he is in possession of the subject matter. For this reason the judge shall require him to take an Oath. If he takes an Oath the judge gives judgement in his favour and dismisses the claim of the other party. If he fails to take an Oath the judge then shifts the burden to the other party who is not in possession of the subject matter in dispute. If he takes the Oath the judge shall give judgement in his favour. But if he too fails to take an Oath he forfeits his right, the judge will then give judgement in favour of the first party who refuses to take an Oath and who is in possession of the subject matter in dispute (see Order 8 of these rules).

d. Where the judge finds that the subject matter in dispute is in possession of both parties or that it is not in their possession or it is in the possession of someone else or that it is not in the possession of anybody, if the weight given to the parties respective evidence in terms of credibility are on an equal basis or that none of the parties can produce any evidence, then, in these circumstances the judge will require each one of them to take an Oath to support his claim. If all of them take an Oath or all of them fail to take an Oath the judge shall give judgement in their favour jointly, and share out the subject matter in dispute between them. If, however, one of the parties declines to take an Oath his right of claim is forfeited; the judge shall dismiss his claim and enter judgement in favour of the party who takes an Oath.

11. If the claim brought before a judge is a suit against a deceased person's estate or against someone who is away and his presence is impracticable or is an infant or a lunatic or the matter concerns an endowment for a mosque or any charity, the judge cannot confirm right on the claimant even if he can establish his claim by producing evidence without the judge directing the claimant to take an Oath in addition to the usual practice. This is what is known as '*Yaminul Kada'i*', the Oath of payment. Once he takes an Oath the judge shall give judgement in his favour. But if he declines to take this Oath his claim is forfeited.

A judgement debtor who is unable to settle his judgement debt whose poverty is proved by evidence, the judge will ask

him to take an Oath of '*Yaminul Kada*' before discharging him. The judgement debtor takes an Oath that he has no means whatsoever to settle the debt and that whenever he acquires the means he will settle the judgement debt.

12. If the complaint brought before the judge is a matter concerning a claim based on strong suspicion made by the plaintiff against the defendant demanding some rights, the judge shall require the defendant to take an Oath. If he takes an Oath he is absolved. If he refuses to take an Oath judgement shall be entered in the plaintiff's favour. The procedure of offering the oath to the plaintiff shall not be exercised here. An example of such a case is where a suit is brought against a person entrusted with property like a shepherd or a businessman or a safe-keeper or store-keeper or a messenger, and the trustee reports that the entrusted property has got lost, but the owner of the property strongly suspected the trustees of negligence, mischief or misappropriation in causing the loss. Such persons as are mentioned above are required to take what is called an Oath of accusation before they are absolved. If such persons refuse to take an Oath the judge shall order them to settle the claim.

13. If a case becomes complicated or is a dispute between relatives or between important personalities which in the observation of the judge may result in a disturbance of the peace or enmity the judge shall call upon the parties to submit to arbitration. If they agree to settle their matter out of court the judge will confirm such a settlement as agreed upon by the parties. None of the parties afterwards can undo the settlement reached, because it has already become a court judgement. But if they are unable to settle the matter out of court the judge shall continue with the case between them in the normal way and in accordance with the provisions of Islamic Law.

14. If the claim brought before a judge is not a claim for money or money value; for example, a marriage suit (not relating to inheritance) or divorce or *Khul'i* or on cruelty to a wife or affinity (not relating to inheritance) or on manumission, in all these cases a claim cannot be substantiated unless two male witnesses are produced. If the plaintiff fails to produce two male witnesses his claim cannot stand and the judge shall dismiss his claim. The defendant shall not be required to take an Oath for this purpose.

15. In claims concerning matters in which males normally have no dealing or concern with, such as an allegation that a

baby is born alive and that he cries after birth or, an allegation that the period of menstruation has been observed or child delivery or a claim on conception or miscarriage or vaginal defect and the like, the evidence of two female witnesses are sufficient to establish the claim. And if the plaintiff produces two female witnesses who gave evidence on his behalf, judgement shall be given in his favour.

Prescription (HUZI)

16. 1. If the claim brought before the judge is in respect of land ownership and the defendant has already been in possession of the land, for example, a farmland or a house, the judge shall first take into consideration the rules governing prescription. If the party in possession of the land deals with it in all manners just like the owner for example, he demolishes it and rebuilds it or plants and harvest in it, showing complete ownership like his personal property, the judge shall not entertain the claim of the other party if the judge is of the opinion that the period of prescription required by law has expired, provided that the original owner is present and has remained passive, making no claim and has not shown any reasonable cause which prevented him from doing so throughout the period of prescription.

The rule governing prescription is detailed below:

2. As a general rule the period of prescription under Islamic Law is ten years. However, there are exceptions to the above rule as follows:

- a. Parties who are related through affinity or who are in-laws through marriage or who have joint ownership over the land in dispute, the period of prescription is forty years.
- b. In a situation where the parties are made up of men and women, a woman's right will not be forfeited however long her male relatives have been in possession of the jointly owned land.
- c. Relatives who are not on good terms with one another, that is, they are enemies to one another, the limited period of prescription for each one of them is ten years. This is an exception to the rule in (1) above.
- d. A party made up of a son and his father, the period of prescription will continue for a very long period of time up to sixty (60) years.

3. If a party is silent over his right and does not ask for it until the period of prescription expires and later claims that

the party in possession of the land is holding it on loan or for *iskani* (lodging) or for tenancy for life (*ta'amiri*) or on tenancy, his right of claim is not forfeited. The judge will investigate the claim and require proof from him by producing evidence. If he can establish his claim by adducing evidence the judge will enter judgement in his favour; but if he fails to establish the claim the judge shall require the defendant to take an Oath in order to absolve himself.

4. If a party in possession of the land makes a counter-claim that he has bought it from the plaintiff or that he obtained it as a gift from the plaintiff the counter-claim shall be considered as proof provided that he takes an Oath. The plaintiff shall not be allowed to call evidence in order to establish that the defendant has obtained possession through a loan or a tenancy once the period of prescription has expired. The expiration of the period of prescription is regarded as evidence for the party in possession of the land.

5. If the period of prescription has not expired as in the situations mentioned above, the plaintiff is still within time and can claim his rights. In this situation the judge will take cognizance of his claim and make an investigation accordingly. The judge shall give judgement either in favour or against the plaintiff depending on the provision of the rules of Islamic Law.

6. If the party in possession of the subject matter in dispute acquired it through confiscation or through the influence of any person in authority, he can never obtain ownership through prescription however long the period of possession. The other party is at liberty to seek his right from him at any time. If he can establish his claim with evidence the judge can give judgement in his favour. If on the other hand the other party cannot establish the claim, the party in possession shall be required to take an Oath in order to absolve himself. Whoever knowingly buys a property or obtains it as a gift from someone whose property has been acquired through confiscation, the decision on his case shall be the same as that of the confiscator. Likewise whoever knowing that the property in his possession, in fact, belongs to the plaintiff at the time he acquires it cannot later claim its ownership through prescription.

7. If a claim before the judge is in respect of animals or clothes the judge is to take into account the duration or the extent of the prescriptive period imposed by Islamic Law on them. The prescriptive limitation between parties who are unrelated through blood in respect of used clothes is one year. If the clothes are unused the limitation period is two years. The limitation period is two years in respect of animals. The

limitation period in respect of animals or durable goods like carpets in cases where the parties involved are related by blood shall be ten years.

8. If a person sells or gives out as a present or on charity any property belonging to the claimant while the claimant is present and has the knowledge that the property is being interfered with but keeps silent, the judge will not entertain his claim should he afterwards sue on the property. The law will regard him as having slept on his right. But if he claims for the proceeds of sale the judge shall take cognizance of his claim.

17. If a complaint brought before the judge concerns a dispute on pregnancy or child legitimacy, it is necessary for a judge to pay attention to the provision of the law about the minimum and maximum periods of pregnancy. The minimum period of gestation is six months while the maximum period is five years. For the above reasons.

- i. If a husband divorces his wife and if she does not remarry after the completion of the *Idda* period, and then gives birth to a child within five years of the divorce and she attributes the child to her former husband who had earlier divorced her, the judge would declare the child to be that of the former husband.
- ii. If a husband divorces his wife and she completes her *Idda* period after which she contracts another marriage with a second husband who has cohabited with her and after which she gives birth to a child before the completion of six months from the date of her second marriage, the court would declare the child to belong to the first husband. The marriage of the second husband shall be dissolved as it would appear that it was during the pregnancy period that the second marriage was contracted. But if she delivers after six months or more, the child would be declared to be that of the second husband and the marriage valid.

18. 1. LIA'NI: If a person finds his wife in a state of pregnancy or finds that she has delivered a child or finds her in the act of committing adultery and intends to disown the pregnancy or the child or intends to make a case that she has committed adultery, the law will allow him to dispute the ownership of the pregnancy or of the child or of defamation of adultery against his wife by taking an Oath of *Lia'ni* and that the Oath must be based on good reasons. A person can at any time be allowed to take an Oath of *Lia'ni* in order to disown a child or pregnancy:

whether the marriage is still in existence or not; whether the wife is passing her Iddah or not, whether she is alive or dead and whether the child is alive or dead. But the law will not allow a husband to take the Oath of *Lia'ni* in order to disown a child of a pregnancy until he proves that after the wife's delivery he has had no sexual intercourse with her; or that after she has observed her menstruation period after which he finds her with a pregnancy or a child he has had no sexual intercourse with her. However, if the second child is delivered within six months after the delivery of the first child the former shall be regarded as a twin of the latter, and the father could not disown him.

2. If a person marries a woman and she delivers a child within five months and twenty four days after consummation, the child could be disowned by the husband automatically, without undergoing any *Lia'ni* Oath. This is because the child has been born within the period regarded by law as less than the minimum period of gestation.

3. If a person divorces his wife and she remains unmarried and then after the lapse of five years she gives birth to a child such an issue could be disowned by the husband without necessarily taking an Oath of *Lia'ni*.

4. If the husband of a wife is a young person who has not reached the age of puberty or is a person whose penis has been cut off or when the marriage was contracted both the husband and the wife were living in different places far away from each other and that there is no possibility of their getting together at all even secretly, and yet the wife becomes pregnant and claimed that the pregnancy belongs to the husband, such pregnancy can be disowned without resorting to the *Lia'ni* Oath.

5. If a wife delivers a child or becomes pregnant or commits adultery with the knowledge of the husband and yet he afterwards has sexual intercourse with her, his right for *Lia'ni* has been forfeited. His right for *Lia'ni* shall also be forfeited if he delays an application for *Lia'ni* without any justifiable reasons for two days after his knowledge of the disputed delivery or conception.

6. The case of *Lia'ni* cannot be entertained anywhere except in an open court before a judge who will adjudicate in the matter. Thus if a wife and her husband agree to settle a case of *Lia'ni* out of court such an act is regarded as illegal and void.

7. When a judge passes *Lia'ni* judgement on a husband and a wife they will be required to take an Oath of *Lia'ni* in Jumu'at Mosque if the couple are both Muslims. But if the wife is a Christian or Jew she will be taken to a place she regards as sacred to take her Oath there. It is essential that the *Lia'ni* Oath is taken in the presence of people of unquestionable

integrity whose number should not be less than four persons. It is desirable that the *Lia'ni* Oath should be taken in the late afternoon. It is also desirable that prior to the administration of the Oath of *Lia'ni* those who are to take it should be admonished to cause them fear Allah so that they may decline from taking the *Lia'ni* Oath.

When the husband and the wife agree on taking the Oath, each one of the couple will swear five times. As regards eye witnessing an act of committing adultery, the husband will testify saying, 'I bear witness and swear by Allah that I indeed saw her committing adultery'. He repeats this four times. As regards disowning pregnancy he will also testify saying, 'I bear witness and swear by Allah that I have not put her in a family way'. He repeats this four times and then concludes with the fifth Oath saying, 'Allah's curse be upon him if he is a liar'. The wife then takes an Oath in respect of an allegation labelled against her for committing adultery saying, 'I bear witness and swear by Allah that he has not seen me committing adultery'. She repeats this four times. As regards disowning pregnancy she will testify also saying, 'I bear witness and swear by Allah that he has put me in a family way'. She repeats this four times and then concludes with the Oath saying, 'Allah's wrath be upon me if my husband is truthful'.

8. The husband shall be asked to take the Oath first and if he declines to do so the pregnancy will conclusively be attributed to him, and he will be given eighty lashes as hard punishment for imputation of adultery to his wife. If he takes the oath he will be absolved against defamation and the pregnancy of the child will not be attributed to him. The wife will then be liable for punishment for adultery if she refuses to take an Oath. After the husband has taken the Oath then the wife will be requested to take the oath. If she takes the Oath she will be absolved from the allegation of committing adultery and her marriage with the husband will be declared dissolved and she will be prohibited from marrying him for ever. If at the beginning the husband refuses to take the Oath but later comes back and says he agrees to take it he will not in that circumstance be allowed to do so. But if it is the wife who refuses to take Oath but later agrees to take it she will be allowed to take it so as to clear herself from the allegation of committing adultery, as her first refusal is regarded as an admission made by her that she has committed adultery. This is because whoever makes a confession for committing adultery but later decides to withdraw his confession the law will allow him to do so.

19. (1) The mode of taking the Oath for confirming a right or for refuting an allegation is given in the words, '*Billahil lazi la Ilaha Illa Huwa*'; no matter the faith swearer, whether a Muslim, Christian, Jew or Pagan. If a civil claim amounts to a quarter of a dinar or three dirhams or an estimated value of one of them it is necessary that the person taking the Oath must take it in the Jumu'at Mosque and at the time of taking it he must be standing and facing Alkibla. If one of those conditions is missing the Oath is incomplete and must be repeated. The person against whom the Oath is to be taken can allow it to be taken outside the Mosque (in court). While taking the Oath Muslims hold the Holy Koran. Christians and Jews hold their Holy Books, Pagans hold the objects they respect as holy. Any swearer takes the Oath in the place of worship which he regards as sacred. A Jew will have, in addition to the above mentioned mode of Oath, the following words, 'The Lord Who revealed the Old Testament to the Prophet Moses (May peace be upon him)'. The Christian will also add the following words: 'The Lord who revealed the New Testament to Jesus (May peace be upon Him)'. If a civil claim does not amount to a quarter of a dinar or three dirhams, the judge can order a person to take the Oath anywhere, without necessarily going to any place of worship.

2. If a judge orders one of the parties to take an Oath, that party takes the Oath in the presence of the other party against whom the Oath is to be taken. If the party against whom the Oath is to be taken refuses to be present at the place of taking the Oath to witness its performance the judge shall appoint two male witnesses who will watch the Oath taking and the witness will be required later to testify in open court that the Oath has in fact been taken. Any reason or ground forwarded by the other party to reject the Oath later will not be accepted.

20. In Islamic Law, for the court to accept the evidence of a witness he must have the following qualifications: He must be of unquestionable integrity, Muslim, adult, sane, not a slave and not one who is heretical of the accepted doctrines of Islam, and he must be a conscious man.

21. If a cause of action brought before a judge is a matter regarding inheritance (distribution of estate) it is necessary for a judge to make a full inquiry about five matters before he starts to distribute the estate. These are:

- i. He must confirm the death of the deceased person whose estate is going to be distributed;
- ii. He must inquire into the affinity of each of the legal heirs in relation to the deceased;

- iii. He must confirm the deceased's exclusive ownership over the estate;
- iv. He must inquire whether the deceased owes any debt; and
- v. He must inquire whether the deceased made any will.

Debt settlement comes first before the distribution of the estate. If any will is made by the deceased it will be complied with. But if the will is in respect of property it must be satisfied from one third of the whole estate only. A will cannot be made on the estate in favour of a person who is himself a legal heir.

22. After the judge has taken all the proceedings, i.e. the parties have been heard and witnesses have given evidence and they have been cross-examined, it is necessary for the judge to give a chance to the party against whom judgement is to be passed by asking him whether he has something more to say for his defence before judgement is passed. If he says he has nothing more to add for his defence the judge calls one or two persons to testify that a chance of defence has been given to that party. Then the judge can pass his judgement.

But if the party says that he has something more to say, the judge shall allow him to say more and shall continue with the proceedings. After the hearing, the judge will again request that party to state anything more in his defence as before, and then the judge gives judgement.

23. If a judge finds that the aforementioned rules do not cover or adequately cover any Islamic procedure in any particular case, such judge shall be at liberty to apply any other rule of Islamic procedure which he considers appropriate to the case before him.

Appendix III

List of Kadis and Grand Kadis of Northern Nigerian *Shari'ah* Courts Of Appeal: (1960-1986)

No.	Name	Tenure	Remarks
1.	Shaykh 'Awad Mohammed Ahmed	1960-1962	The First Grand Kadi of Northern Nigeria: Retired in 1962.
2.	Shaykh Abubakar Mahmud Gumi	1960-1975	(i) The First Deputy-Grand Kadi of Northern Nigeria: 1960-1962 (ii) The Second and Last – Grand Kadi of Northern Nigeria: 1962-1975 (iii) Appointed Grand Mufti of Nigeria in 1975
3.	Alhaji Haliru Binji	1960-1987	(i) Kadi of Northern Nigeria <i>Shari'ah</i> Court of Appeal: 1960-1962 (ii) The Second and Last Deputy Grand Kadi of Northern Nigeria (1962-1975). (iii) Presiding Kadi of the Kano/North-Western States Division of Northern Nigeria <i>Shari'ah</i> Court of Appeal: 1970-1975. (iv) First Grand Kadi of Sokoto State: 1975-1987.
4.	Alhaji Abubakar Sidiq'Abbas Zaria	1960-1970	Kadi of Northern Nigeria <i>Shari'ah</i> Court of Appeal: Retired in 1970.
5.	Alhaji Abubakar Zaki Gwandu	1960-1975	(i) Kadi of Northern Nigeria <i>Shari'ah</i> Court of Appeal (1962-1970). (ii) Died (1975) in active service of Kano/North-Western States Division of the Northern Nigeria <i>Shari'ah</i> Court of Appeal.

6.	Alhaji Jibril Daura	1962-1974	(i) Kadi of Northern Nigeria <i>Shari'ah</i> Court of Appeal (1962-1970). (ii) Died (1974) after retirement: though he served the North Central/ Kwara States Division of Northern Nigeria <i>Shari'ah</i> Court of Appeal before retirement
7.	Alhaji Mahmud Yola	1962 to date	(i) Kadi of Northern Nigeria <i>Shari'ah</i> Court of Appeal (1962-1970). (ii) Kadi of North Eastern/Benue-Plateau States Division of the Northern Nigeria <i>Shari'ah</i> Court of Appeal (1970-1975). (iii) Grand Kadi of Gongola State (1975 to date).
8.	Alhaji Baba Kura Imam	1962 to 1986	(i) Kadi of Northern Nigeria <i>Shari'ah</i> Court of Appeal (1962-1970). (ii) Kadi of North-Eastern/Benue-Plateau States Division of the Northern Nigeria <i>Shari'ah</i> Court of Appeal (1970-1975); (iii) Grand Kadi of Borno State (1975-1986).
9.	Alhaji Abubakar Bashir Wali	1970 to date	(i) Kadi of Kano/ North Western States Division of Northern Nigeria <i>Shari'ah</i> Court of Appeal; (ii) Justice of the (Federal) Court of Appeal Kaduna Division. (iii) Now a Justice of the Supreme Court.
10.	Alhaji Hamzah Muhammad	1970 to date	(i) Kadi of Kano/ North Western States Division of Northern Nigeria <i>Shari'ah</i> Court of Appeal (1970-1975). (ii) Kadi of Kano State (1975 to date).

11.	Alhaji Abdulkadir Orire	1971 to date	(i) Kadi of North Central/Kwara State Division of Northern Nigeria <i>Shari'ah</i> Court of Appeal (1971-1975); (ii) Grand Kadi of Kwara State (1975 to date).
12.	Alhaji Muhammadu Dodo	1972 to 1984	(i) Kadi of North Central/Kwara States Division of Northern Nigeria <i>Shari'ah</i> Court of Appeal (1972-1975). (iii) Grand Kadi of Kaduna State (1975-1984) Retired.
13.	Alhaji Muazu Aliyu	1973 to date	(i) Kadi of North Central/Kwara States Division of Northern Nigeria <i>Shari'ah</i> Court of Appeal (1973-1975). (ii) Grand Kadi of Kaduna State (1984 to date).
14.	Alhaji Ahmad Arabi Jos	1973-1974	Kadi of North Eastern/Benue-Plateau States Division of Northern Nigeria <i>Shari'ah</i> Court of Appeal: Died in active service in 1974.
15.	Alhaji Bashir Sambo	1975 to date	(i) Kadi of Kaduna State <i>Shari'ah</i> Court of Appeal (1975-1985). (ii) Grand Kadi of Abuja (1985 to date)
16.	Dr. Hasan Ibrahim Gwarzo	1975 to date	Grand Kadi of Kano State.
17.	Alhaji Yahaya Kanem	1975 to date	Grand Kadi of Benue/Plateau State.
18.	Alhaji Abdul Nasir A. Mafara	1975 to date	Kadi of Sokoto State <i>Shari'ah</i> Court of Appeal
19.	Alhaji Abdulmalik Bappa Mahmud	1976 to date	Grand Kadi of Bauchi State.
20.	Shaykh Ahmad Lemu	1976 to date	Grand Kadi of Niger State.
21.	Alhaji Mustapha Ibrahim	1976 to date	Kadi of Bauchi State <i>Shari'ah</i> Court of Appeal.

22.	Abubakar Garba Mallam	1976 1978	Kadi of Bauchi State <i>Shari'ah</i> Court of Appeal Retured in1978.
23.	Alhaji Ustaz Yunusa Abdullahi	1976 to date	Kadi of Kwara State <i>Shari'ah</i> Court of Appeal.
24.	Alhaji Husain Yahya	1976-1985	Kadi of Kwara State <i>Shari'ah</i> Court of Appeal; died in service (1985).
25.	Alhaji Yunusa Kanchi	1976 to date	Kadi of Niger State <i>Shari'ah</i> Court of Appeal
26.	Alhaji Ismaila Adamu	1976 to date	Kadi of Benue/ Plateau <i>Shari'ah</i> Court of Appeal.
27.	Alhaji Umar Ibrahim	1978-1985	Kadi of Kaduna State <i>Shari'ah</i> Court of Appeal; retired 1985.
28.	Alhaji Haruna Rashid	1978 to date	Kadi of Kaduna State <i>Shari'ah</i> Court of Appeal.
29.	Alhaji Usman Mohammed	1978 to date	Kadi of Kaduna State <i>Shari'ah</i> Court of Appeal.
30.	Alhaji Abubakar Panti	1978 to date	Kadi of Niger State <i>Shari'ah</i> Court of Appeal.
31.	Alhaji Bappa Aliyu	1979 to date	Kadi of Bauchi State <i>Shari'ah</i> Court of Appeal.
32.	Alhaji Mahmud Abdullahi	1979 to date	Kadi of Bauchi State <i>Shari'ah</i> Court of Appeal.
33.	Alhaji Muhammadu Liman	1980 to date	Kadi of Benue/ Plateau States <i>Shari'ah</i> Court of Appeal.
34.	Alhaji Usman Mohammed	1980 to date	Kadi of Sokoto State <i>Shari'ah</i> Court of Appeal.
35.	Alhaji Mohammed Zaria Musa	1981 to date	Kadi of Sokoto State <i>Shari'ah</i> Court of Appeal.
36.	Alhaji Usman Mukhtar Birni Kebbi	1981 to date	Kadi of Sokoto State <i>Shari'ah</i> Court of Appeal.

37.	Alhaji Mutalub Ahmad Ambali	1982 to date	Kadi of Kwara State <i>Shari'ah</i> Court of Appeal.
38.	Alhaji Musa Imam	1985 to date	Kadi of Abuja <i>Shari'ah</i> Court of Appeal.
39.	Alhaji Yusufu Na Gwamna Argungu	1986 to date	Kadi of Sokoto State <i>Shari'ah</i> Court of Appeal.

Tenures of the Following Kadis were Not Completed when Responding to Our Questionnaires

No.	Name	Tenure	Remarks
40.	Alhaji Musa Kida	Not supplied	Kadi of Borno State <i>Shari'ah</i> Court of Appeal
41.	Alhaji Shettima Muhammad Abani	Not supplied	Kadi of Borno State <i>Shari'ah</i> Court of Appeal
42.	Alhaji Ahmadu Abba Yola	Not supplied	Kadi of Gongola State <i>Shari'ah</i> Court of Appeal.
43.	Alhaji Muhammad L. M. Dodo	Not supplied	Kadi of Gongola State <i>Shari'ah</i> Court of Appeal.
44.	Alhaji Mustapha Muhammad Yola	Not supplied	Kadi of Gongola State <i>Shari'ah</i> Court of Appeal.
45.	Alhaji Mansure Muhammad	Not supplied	Kadi of Kano State <i>Shari'ah</i> Court of Appeal.
46.	Alhaji Kulya Alkali	Not supplied	Kadi of Kano State <i>Shari'ah</i> Court of Appeal.
47.	Alhaji Nasiru Ahmed	Not supplied	Kadi of Kano State <i>Shari'ah</i> Court of Appeal.
48.	Alhaji Yusuf Muhammad	Not supplied	Kadi of Kano State <i>Shari'ah</i> Court of Appeal.
49.	Alhaji Naibi Sulaiman	Not supplied	Kadi of Kano State <i>Shari'ah</i> Court of Appeal.

APPENDIX IV

**Sokoto State Legal Notice No.8 of 1976
As Contained in
Gazette No. 6 Vol. 10 of 23 December 1976
Sharia Court of Appeal
Sokoto State Sessions, 1977**

It is notified for general information that in exercise of the powers conferred upon him by Section 18 of the Sharia Court of Appeal Law (Cap. 122) the Grand Kadi has directed as follows:

1. Sessions of the Sharia Court of Appeal shall be held at the places specified in the first column of the schedule commencing on the date specified opposite to such place in the second column of the schedule and such sessions shall be for the hearing of cases on appeal save where otherwise provided in any notice published under paragraph 2.
2. A judge may by notice published in the Gazette appoint or alter the time and place at which sessions of the *Shari'ah* Court of Appeal are to be held for the hearing of case on appeal.
3. Subject to the provisions of paragraph 1 and paragraph 2, the Sharia Court of Appeal shall sit for the hearing of cases on appeal in Sokoto and Niger continuously throughout the period 1st January to 31st December 1977, except on public holidays.

SCHEDULE

	Date	Place
1. Monday	17 th January 1977	Gusau
2. Monday	14 th February 1977	Birnin Kebbi
3. Thursday	17 th February 1977	Sokoto
4. Tuesday	1 st March 1977	Minna
5. Thursday	3 rd March 1977	Bida
6. Monday	7 th March 1977	Kontagora
7. Monday	18 th April 1977	Yawuri
8. Monday	16 th May 1977	Gusau
9. Friday	20 th May 1977	Sokoto
10. Tuesday	24 th May 1977	Birni Kebbi
11. Tuesday	14 th June 1977	Minna
12. Thursday	16 th June 1977	Bida

13. Monday	20 th June 1977	Kontagora
14. Monday	25 th July 1977	Sokoto
15. Thursday	28 th July 1977	Gusau
16. Monday	8 th August 1977	Birnin Kebbi
17. Wednesday	21 st September 1977	Zuru
18. Tuesday	27 th September 1977	Sokoto
19. Wednesday	21 st October 1977	Minna
20. Monday	14 th November 1977	Sokoto
21. Thursday	17 th November 1977	Gusau
22. Monday	5 th December 1977	Birnin Kebbi
23. Thursday	8 th December 1977	Sokoto

Made at Sokoto the 22nd day of December 1976
Chief Registrar,
Sharia Court of Appeal,
Sokoto State of Nigeria.

APPENDIX V

Venue of Sessions for States' *Shari'ah* Courts of Appeal as Contained in Their Schedules for 1986

STATE	TOWNS	SIGNATORY
Bauchi	1. Bauchi 2. Gombe 3. Azare 4. Kaltungo 5. Misau 6. Ningi	Alhaji Abdullahi Y. Marafa (Chief Registrar)
Benue/Plateau	1. Jos 2. Keffi 3. Lafia 4. Shendam 5. Makurdi 6. Idah	Ilyasu B. Haruna (Registrar)
Borno	1. Maiduguri 2. Biu 3. Gashua 4. Potiskum 5. Gwoza 6. Gamboru 7. Nguru	Manu Musa Dumbulwa (Ag. Chief Registrar)
Gongola	1. Yola 2. Mubi 3. Jalingo 4. Wukari 5. Gembu 6. Ganye 7. Michika	Ibrahim Babbawa (Chief Registrar)
Kaduna	1. Kafancha 2. Katsina 3. Zaria 4. Kaduna 5. Daura 6. Funtua	Alhaji Ahmed Dodo Ibrahim (Chief Registrar)
Kano	1. Kano 2. Hadeija 3. Rano 4. Gumel 5. Kazaure 6. Birni Kudu 7. Gaya/Jahun 8. Gwarzo	Alhaji Nasiru Mustapha (Ag. Chief Registrar)
Kwara	1. Ilorin 2. Lokoja 3. Omu-aran 4. Okene 5. New-Bussa	Alhaji S. O. Mohammad (Senior Registrar)

Niger	1. Minna 2. Bida 3. Kontagora 4. Suleja	Alhaji Abdulkadir Sallawu (Ag. Chief Registrar)
Sokoto	1. Sokoto 2. B/Kebbi 3. Gusau 4. Argungu 5. T./Mafara 6. Yauri 7. Zuru	Alhaji Abubakar Atiku Zagga (Chief Registrar)

APPENDIX VI

Summary of Cases in 1980 And 1985 Editions of *Shari'ah*
Law Reports; Published by Centre of Islamic Legal Studies,
Institute of Administration, Ahmadu Bello University
Zaria-Nigeria

Editor: Ahmed I. Omar

1. Cases from Bauchi State *Shari'ah* Court of Appeal

a. i. *Case Title*

Mairama Dukku v. Yauta Dukku – SCA/CV/14/
GM/76

of 29th February, 1977

ii. *Presiding Justices*

Alhaji AbdulMalik Bappa Mahmud – The Grand Kadi
Alhaji Mustapha Ibrahim – Kadi; and
Alhaji Garba Abubakar – Kadi

iii. *Catchwords*

Custody of children – when custody of girls ends –
criteria determining the custody of girls – Adherence
to the order of priority – Guardian's order of priority.

iv. *Headnote*

Yauta sued his ex-wife, Mairama in the Dukku Area
Court, claiming the custody of his daughter who
was nine years old. The court gave the daughter to
her mother, Mairama, until the child was married.

Yauta appealed from this decision to the Upper
Area Court on the ground that Mairama, the ex-
wife of Yauta, was married to a 'stranger' (one who
is not within the appellant prohibited degree of
relationship with the child under custody) and that
he the appellant had his own mother. Accordingly
the Upper Area Court gave the custody of the child
to the father Yauta. Hence this appeal of Mairama
to the *Shari'ah* Court of Appeal.

HELD BY THE *SHARI'AH* COURT OF APPEAL

1. The court should act strictly according to the order
of preference of guardians as laid down by law and
no relative of nearer degree can be excluded in
favour of another except for a good reason.

2. A woman loses her right of custody when she gets married to a stranger.

b. i. *Case Title*

Gidado Dan Gwabba v. Abdullahi Babansu
SCA/CV/3/BH/77 of 10th August 1977

ii. *Presiding Justices*

Alhaji AbdulMalik Bappa Mahmud – The Grand Kadi
Alhaji Mustapha Ibrahim – Kadi; and
Alhaji Garba Abubakar – Kadi

iii. *Catchwords*

Succession – Law of Paternity – Law of Qazf or
Defamation.

iv. *Headnote*

Abdullahi sued Gidado in the Area Court claiming that Gidado refused to pay him the sum of ₦144.38k being Abdullahi's share in the estate of his late father Malam Musa. The said share was put under the care of Gidado, because of the absence of Abdullahi at the time of the distribution of the estate. The refusal of Gidado was on the ground that Abdullahi was not a legitimate son of the deceased. Instead of deciding the issue, the Area Court asked Gidado to make an appeal to the Upper Area Court which in turn asked him to prove his allegation. Gidado failed to establish his allegation and when his appeal was dismissed he appealed to the *Shar'ah* Court of Appeal.

HELD BY THE SHAR'AH COURT OF APPEAL:

The paternity of a person born under the lawful wedlock can only be challenged by husband.

c. i. *Case Title*

Alhaji Yakubu Aliyu and Mallam Mu'azu Aliyu v. Shehu Jarumi BAS/CVA/53/78

ii. *Presiding Justice*

Alhaji AbdulMalik Bappa Mahmud – The Grand Kadi
Alhaji Mustapha Ibrahim – Kadi.

iii. *Catchwords*

Maxim: It is for the Mudda'e to bring evidence and for the Mudda'e alayhi to swear an Oath – evidence of an enemy is inadmissible – Enmity must relate to worldly wealth, dignity, rank and a fight – validity of Hauzi prescription of a real property belonging to relatives – retrial ordered.

iv. Headnote

Shehu Jarumi filed a suit in the Galambi Area Court against his parental uncles Alhaji Yakubu and Mallam Mu'azu Aliyu. In his action he claimed the ownership of a house in possession of the two defendants on the grounds that the said house belonged to his late father Jalo alone. The defendants denied the claim and contended that the house belonged to them. After hearing evidence from both parties the court decided in favour of the plaintiff. The defendants then appealed from this decision to the Upper Area Court Bauchi, which upheld the decision of the court below. The defendant again made an appeal from this decision to the *Shari'ah* Court of Appeal, Bauchi, on the following grounds: (1) They have been dwelling in the said house for 48 years or more with the full knowledge of their germane brother Jalo who did not raise any claim until his death only two years ago. (2) The Upper Area Court erred in receiving evidence against them from their enemy. (3) The Upper Area Court also erred in not giving its reasons why it upheld the decision of the court below.

The *Shari'ah* Court of Appeal Bauchi quashed the decisions of the court below and

HELD:

- a. The case be sent to the Upper Area Court, Ningi for retrial.
- b. Appeal is allowed.

d. i. Case Title

Habiba Sarkin Fulani v. Alhaji Dahiru Dayi
SCA/CV/59/BA/75 of 26th January, 1978.

ii. Presiding Justices

Alhaji AbdulMalik Bappa Mahmud – The Grand Kadi
Alhaji Garba Abubakar – Kadi

iii. Catchwords

Khul^c – Binding nature of Italics –
Khul^c – Mere promise does not amount
to Khul^c Administrative issues
irrelevant to the case –
Talaq without intimidation or threat.

iv. Headnote

Habiba Sarkin Fulani sued her husband Alhaji Dahiru Dayi at the Area Court, alleging that he divorced her by way of Talaq. Alhaji denied her claim and on her failure to establish her claim the court dismissed the case,

and advised Habiba to return to her husband. When she said she would never return to Alhaji the latter offered to release her on payment of ₦500 which she agreed to pay. When the money was brought in the court, Alhaji changed his mind and refused to take the same. Here the court deposited the money in the bank and passed a decree of judicial divorce on ground of *Khut*.

Alhaji appealed to the Upper Area Court and the latter reversed the decision of the court below, for two reasons: first, the personal interference in the question of *Khut* by the trial judge and his failure to discuss and quote the authorities on the law of *Khut*.

HELD BY THE SHARFAH COURT OF APPEAL:

1. When *Khut* is in issue, the duty of the court is to examine the nature and mode of the husband's request for payment of *Khut* money.
2. A statement or promise by the husband to accept *Khut* money or to divorce his wife on ground of *Khut* may be binding where contractual relations can be inferred from the circumstances or where the wife is put to a disadvantage.

e. i. Case Title

Ladi Alhaji Jagaba v. Liman Adamu Zigau-BAS/
SCA/LVA/9/BH/8 of 24th April 1979.

ii. Presiding Justices

Alhaji AbdulMalik B. Mahmud – The Grand Kadi, and
Alhaji Mustapha Ibrahim – Kadi

iii. Catchwords

Guardianship of orphan wards – when deceased father leaves on Wasi or executor, the judge is under a duty to appoint one. Guardianship of property extends only to majority-Guardian *ad Litem*. Hearsay is not admissible in evidence.

iv. Headnote

Ladi Alhaji Jagaba instituted an action in Toro Area Court as guardian ad litem of her orphan male child Mamudu, against the Imam of Zigau, Adamu Zigau. In her action Ladi prayed the court to declare her child's share in his late father's estate which consisted only of cows which were under the custody of Alhaji Jagaba, Ladi's father. She also prayed the court to appoint her father Alhaji Jagaba as the guardian of property of the said child. The Area Court decided the case in her favour.

Imam then appealed from this decision to Upper Area Court Bauchi, on two grounds: (1) the distribution of the estate made by the Area Court was not correct; (2) Alhaji Jagaba was not suitable because five of the cows under his custody were lost. The Upper Area Court quashed the decision of the court below, redistributed the estate and appointed Imam Zigau as the guardian of property of the said orphan child. Ladi did not agree with this decision of the Upper Area Court, Bauchi and therefore appealed to the *Shari'ah* Court of Appeal Bauchi, for the following reasons:

1. the redistribution made by the Upper Area Court was wrong;
2. there was no blood relationship between her orphan child's deceased father and Liman Adamu Zigau and
3. the said Liman earlier withheld the estate from the court. The Shari'ah Court of Appeal Bauchi refused to disturb the ruling of the Upper Area Court and

HELD:

1. Property of minor must be in the custody of his guardian.
2. The guardian of a minor's property is his father or a person appointed by him under a Will or an 'Imam' when there is no Will.
3. The court can appoint a guardian for a minor's property.
4. Appeal is dismissed.

f. i. Case Title

Daudu Haderi Bakin Kasuwa Misau v. Barma Jamsuguri Misau SCA/CV/3/M/1980 of 4th June 1980.

ii. Presiding Justices

Alhaji AbdulMalik B. Mahmud	– The Grand Kadi
Alhaji Mustapha Ibrahim	– Kadi, and
Alhaji Mahmood Abdullahi	– Kadi

iii. Catchwords

Paternity Law – Probative value of Medical reports and blood test Quantum of evidence required to establish paternity – minimum period of gestation – The maxim *al-walad lil-Firash*.

v. Headnote

Proceedings were initiated before the Area Court at Missau by Barma against his divorced Canajo and her husband, Daudu Maderi, claiming the paternity of a child born to the latter. Although Canajo acknowledged the claim that she was married to Barma, she pleaded that she was not pregnant at the dissolution of that marriage, adding that she

entered the second union with her present husband only after the expiry of the required ciddah. Barma insisted that Canajo was pregnant when the marriage was dissolved and brought seven witnesses who testified that they were only told by Barma that Canajo was pregnant. The court disregarded the hearsay evidence and exacted an Oath from Canajo that she did observe the cidda of divorce and that she was not pregnant when contracted the second marriage with Dauda. Accordingly, the Area Court decided that the child belonged to the second husband. Consequent upon this Barma appealed to the Upper Area Court Misau, which sent him together with Canajo, her husband and their child to the Specialist Bauchi Hospital for blood test. On receiving the medical reports, the Upper Area Court, quashed the decision of the Court below and gave the child to Barma. Then Canajo and her husband Daudu appealed from this decision to the *Shari'ah* Court of Appeal, Bauchi on these grounds:

1. that the Upper Area Court erred in accepting the medical reports as a conclusive evidence,
2. the Upper Area Court also erred in disregarding Canajo Oath before the Area Court that she observed three menstrual circles after the dissolution of her marriage with Barma.

THE SHARFAH COURT OF APPEAL, BAUCHI HELD:

1. Islamic Law does not provide for the use of doctor's report as a means of establishing paternity relationship.
2. Paternity can be established by the evidence of two male witnesses of unimpeachable character.
2. Cases from Borno State *Shari'ah* Court of Appeal
 - a. i. *Case Title*
Ali Damaturu v. Abba Mai Sule –
SCA/CV/6/BO/76 of 15th August 1976
 - ii. *Presiding Justices*
Alhaji Baba Kura Imam – The Grand Kadi
Alhaji Musa Kida – Kadi
 - iii. *Catchword*
Prescription – Minimum period ten years or more –
The number of years coupled with Oath – sufficient evidence.

iv. Headnote

Appellant sued respondent in Damaturu Area Court claiming the ownership of a house in possession of the respondent. In his defence the respondent stated that he bought the house for the sum of ₦40.00 from the appellant's late father in the presence of witnesses all of whom had died. But he alternatively added that after the sale to him, the house had been in his possession for 17 years or more during which period he rebuilt it and used to repair it from time to time and this was known to the buyer himself.

At the end of the day, the trial court put the respondent to his Oath and decided in his favour.

The appellant appealed to the Upper Area Court which upheld the decision of the trial court.

HELD BY THE SHARIAH COURT OF APPEAL

1. Whoever is in possession of a plot of land for a period of at least ten years or more without a challenge of title, if such a person alleges to have purchased it from a complainant or his predecessors but is unable to prove his allegation, his Oath coupled with a minimum period of ten years operates as a conclusive evidence in his favour, (has ownership of the land).

b. i. Case Title

Palmata Abdul v. Abdullahi –
SCA/CV/57/BO/74 of 17th August 1976

ii. Presiding Justices

Alhaji Baba Kura Imam	– The Grand Kadi
Alhaji Shettima Moh. Abani	– Kadi; and
Alhaji Musa Kida	– Kadi

iii. Catchwords

Muslim Law – Personal Law – Paternity – Minimum period of gestation child born after seven months of the marriage.

iv. Headnote

Abdullahi, the respondent brought an action against his wife Palmata claiming that she gave birth to a child, seven months after their marriage.

Palmata said in reply that before their marriage she had a concealed pregnancy from her previous husband Corporal Kolo. But she admitted that the birth took place seven months after her marriage with the respondent.

The previous husband gave evidence that he knew about the pregnancy and he reproached Palmata for the concealment. The court in the first instance did not believe him and decided that the child belonged to the respondent.

When Palmata appealed to the Upper Area Court against this decision, the said court upheld the decision of the court below. Hence this appeal before the *Shari'ah* Court.

HELD BY THE SHARI'AH COURT OF APPEAL

1. When a child is born only a day after the minimum period of gestation which is six months, the child belongs to the husband.
2. Pregnancy becomes discernable in *Shari'ah* within the period of three months.

c. i. Case Title

Alhaji Adamu Sigal v. Alhaji Korima
SCA/CV/49/BO/76 of 29th March 1977

ii. Presiding Justices

Alhaji Baba Kura Imam	– The Grand Kadi
Alhaji Shetima Abani	– Kadi and
Alhaji Musa Kida	– Kadi

iii. Catchwords

Partnership – Mudaraba – Money Lending for trading purposes – profit as part of the capital confession and avoidance.

iv. Headnote

The appellant sued the respondent in the Upper Area Court, claiming the recovery of the sum of ₦4,400.00 being the capital amount of money given by him to respondent to trading purposes on the understanding that whatever profit acquired from it was to be shared by them.

The defendant did not deny the claim, but pleaded that since he started trading with the money he paid to the appellant a gross profit of ₦5,400.00 which was more than the loan.

Accordingly the trial court decided that since from a loan of ₦4,400.00 the appellant had a profit of ₦5,400.00 paid to him, he should return ₦1,000.00 to the respondent.

The appellant appealed from this decision to the *Shari'ah* Court of Appeal on the grounds that the profit given to him should not be used to repay the capital.

HELD BY THE SHARI'AH COURT OF APPEAL

1. Profit and Capital are two different things. Therefore the profit cannot be used to repay the capital invested.
2. Under the *Shari'ah* partners should ascertain what profit they make so that it can be shared according to the terms of their partnership.

d. i. *Case Title*

Fatume and Abu Sarkin v. M. Jidda –
SCA/CV/54/BO/76 of 10th November 1977

ii. *Presiding Justices*

Alhaji Baba Kura Imam – The Grand Kadi
Alhaji Musa Kida – Kadi

iii. *Catchwords*

Ihtibas and desertion – cruelty – Khul^c – the doctrine of Tahkim or Reconcillation – Force of decision of reconciliation.

iv. *Headnote*

The husband, respondent sued his wife the appellant at Maiduguri Area Court claiming that she deserted the matrimonial home and demanded she be ordered to return to it. The wife resorted to confession and avoidance stating the reason for desertion was his cruelty. Cruelty was not established but she refused to return to him. Here the husband offered to divorce her by way of Khul^c, if she paid the sum of ₦846.00. At this stage and in compliance with the law of the *Tahkim* the trial judge referred the whole dispute to arbitrators who decided that the marriage had irretrievably broken down, and therefore, the wife should pay ₦400.00 to the husband and later divorce her by way of Khul^c. The court of first instance acted on the decision of the arbitrators hence the marriage was judicially dissolved.

The husband appealed to the Upper Area Court on the grounds that the wife did not pay him the sum he demanded, viz, ₦846.00, but she only paid ₦400.00. The Upper Area Court reversed the decision of the Area Court on the grounds that the husband was not at fault but the wife simply could not agree to live with him.

HELD BY THE SHARFAH COURT OF APPEAL:

Where the marriage has irretrievably broken down, the judge should require each of the parties to appoint a representative who will examine the dispute and suggest remedies to the judge.

e. i. Case Title

Muhammadu Bulami v. Ashe Mohammed

SCA/CV/33/BO/75 of 6th March 1978

ii. Presiding Justices

Alhaji Baba Kura Imam

– The Grand Kadi

Alhaji Musa Kida

– Kadi

iii. Catchwords

Law of desertion or Nushur – Khul^c – Revocation of offer to divorce after payment of Khul^c, money.

iv. Headnote

Mammadu Bulami sued his wife Ashe Moh, at the Area Court, on the grounds of desertion and sought her return to her matrimonial home. In answer, the wife asserted that she did not want to live with her husband for his cruelty and his failure to maintain her. The husband demanded an Oath in support of the allegation, but she refused but asked that both of them be put on Oath.

Here the husband voluntarily offered to divorce her by way of Khul^c on payment of ₦20.00 which the wife paid as ordered after accepting.

On 19/6/76 the husband before the court agreed to the wife paying him ₦20.00 which the wife paid as ordered by the court. All of a sudden the husband had a change of heart refusing to accept the payment of ₦20.00 demanding that both of them take an Oath and return to the matrimonial home. The trial judge rejected the husband's demand and decreed judicial divorce on the grounds of Khul^c.

The Upper Area Court confirmed the decision and on appeal to the *Sharfa*h Court of Appeal it was held:

- 1. Where an offer for Khul^c has been made and agreed upon by the parties, the offer cannot be withdrawn unilaterally.**

3. i. A CASE FROM KADUNA STATE SHARFAH COURT OF APPEAL

i. Case Title

Jubrin Yusuf v. Ada Maiwada –

SCA/7/ZA/77 of 2nd February 1978

ii. Presiding Justices

Alhaji Muhammadu Dodo	– The Grand Kadi
Alhaji Muazu Aliyu	– Kadi
Alhaji Bashir Sambo	– Kadi

iii. Catchwords

Prescription against private lands – Ten years minimum period – Total acquiescence by owner – Absolute equality between Muslims and Christians before *Shar'ah* Courts impartiality of witnesses.

iv. Headnote

Appellant sued Ada Maiwada, a Christian in the Area Court claiming the recovery of a plot of land which was leased/pledged to Ada's father by the appellant's late father; and which at this time in Ada's possession. In answer, Ada affirmed that the land in his possession was bought in 1954 by his father from appellant's father.

However when the parties failed to produce the necessary evidence, the court put the appellant on his Oath and decided the land as a pledge/lease.

When Ada appealed to the Upper Area Court, it reversed the decision of the trial court and ordered the transfer of title on the basis of sale, to the respondent, Ada Maiwada.

The appellant then appealed to the *Shar'ah* Court of Appeal on the grounds that he had already produced two witnesses, Chindo and Lami, who supported Ada's claim, but the land was pledged and sold. In addition, Ada was a Christian who wanted to build a church on the land.

HELD:

1. Religious belief should not be a disadvantage to litigants before the *Shar'ah*.
2. A person cannot be a witness before the *Shar'ah* Court in a case he is interested in.

4. CASE FROM KANO STATE SHARFAH COURT OF APPEAL

a. i. Case Title

Alhaji Jafaru Danmallan v. Alhaji Usman Mani
D/IYA and two others SCA/CV/KN/427/78 of
10th November 1978.

ii. Presiding Justices

Alhaji Mansure	– Presiding Kadi
Alhaji Nasir Ahmed	– Kadi

iii. Cathwords

Failure to consummate marriage that has been concluded five years ago constitutes *Darar* legal

cruelty. Maliki law allows a wife a judicial divorce on the ground of *Darar*.

iv. *Headnote*

The bride Hajiya Aishatu D/Iya petitioned city No.2 Area Court, Kano claiming that although her groom Alhaji Jafaru Danmallan concluded their marriage five years ago, he failed to consummate the said marriage and to give her maintenance. The bride therefore prayed the court to order the immediate consummation of the marriage, or alternatively, dissolve the marriage for cruelty. The groom admitted all her claim except with regard to maintenance and at any rate pleaded that he was willing, able and ready to consummate the marriage provided the court allowed him a respite. The bride objected to this request and contended that the groom was not serious. The court however consented to the groom's request on condition that if no consummation took place, the marriage would be dissolved. The case was adjourned to 7/7/78. On that date the groom did not turn up but the bride appeared and told the court that consummation again had not taken place. Again the court adjourned for 10/7/78 on which the bride appeared but the groom was absent. The Area Court decided to the dissolution of the marriage for legal cruelty. The groom appealed from this decision to the *Shari'ah* Court of Appeal Kano, on the grounds that the Area Court failed to investigate the case and that the case was decided against him in his absence. The *Shari'ah* Court of Appeal saw no reason to intervene and refused to disturb the decision of the court below and

HELD:

Appeal is dismissed.

b. i. *Case Title*

Sambo Dakata v. Alhaji Tsoho Lore
SCA/CV/KN/76/78 of 3rd January 1979

ii. *Presiding Justices*

Alhaji Dr. Hassan Ibrahim Gwarzo – The Grand Kadi
Alhaji Mansur Mohammed – Kadi.

iii. *Catchwords*

Illegal destruction of someone's building – Recovery by violence of an alledged title to land Da'awa-claims on plot dispute. Contract or sale of land under

disputed land. Time factor – limitation of time as a bar to the subsequent recovery of an agreement. A stranger who is not party to a contract cannot sue on it.

iv. Headnote

Mallam Sambo sued al-Hajji Tsoho in the Waje Area Court No. 1 claiming the recovery of a plot which he bought from Alhaji Bala. He also claimed compensation for damages caused by the defendant's boys who had beaten the workers on the plot and destroyed the same as well. The defendant denied the claim and insisted that the plot belonged to him. Eventually the Area Court decided in favour of the defendant. Mal. Sambo did not agree with the decision of the Area Court and appealed to the *Shar'ah* Court of Appeal Kano, on two grounds.

1. The Area Court failed to call his witnesses and (2) the trial court failed to compel two witnesses to answer questions put to them on cross-examination. The *Shar'ah* Court of Appeal Kano, set aside the decision of the court below and

HELD:

1. Sambo's sale agreement stands valid and the plot is vested in him forthwith.
2. Appeal is allowed.

5. A CASE FROM NIGER STATE SHARFAH COURT OF APPEAL

i. Case Title

Muhammadu Bida and Amina v. Muhammadu Dwafu
SCA/NS/CV/38/77 of 31st January 1978

ii. Presiding Justices

Alhaji Sheikh Ahmed Lemu – The Grand Kadi
Alhaji Yunusa Kenchi Agaie – Kadi

iii. Catchwords

Personal Law – Marriage – Second Marriage during 'Iddah of the first marriage – Medical opinion on matters of 'Iddah and pregnancy.

iv. Headnote

Amina, the second appellant, secured a Khul' Divorce from the first husband Muhammadu Dwafu, respondent at Etsugyies Area Court. When she remarried Muhammadu Bida, the first appellant, the first husband sued her at Area Court alleging that she was pregnant by him and on her denial of this allegation, the trial

judge sent Amina to Bida General Hospital seeking medical advice. Replying on the medical reports, it was confirmed that Amina was actually pregnant for four months. On her refusal to accept the medical opinion, the court decided that the second marriage be annulled and therefore Amina be ordered to return to her first husband the respondent. The Upper Area Court at Minna upheld the decision of the court below:

HELD BY THE SHARFAH COURT OF APPEAL

A statement by a woman as to the expiry of her 'Iddah, menstruation or delivery may be taken as a conclusive evidence without necessarily subjecting her to Oath.

6. CASES FROM BENUE/PLATEAU STATES SHARFAH COURT OF APPEAL

a. i. Case Title

Umaru Ali v. Hajiya Binta PLS/SCA/JSS/CV/13/77 of 26th October 1977.

ii. Presiding Justices

Alhaji Yahaya Muhammad Kanam	– The Grand Kadi
Alhaji Isma'ila Adamu	– Kadi and
Alhaji Mustapha Muhammad	– Yola Kadi

iii. Catchwords

Personal Law – Paternity Law – Paternity disputed when wife fails to prove talaq – the māxim '*al-Waladu lil firash*' applies.

iv. Headnote

In his action against Hajiya Binta, at Jos Area Court II, Umaru Ali claimed paternity of the child called Usman on the grounds that Binta was still his wife when this child was born although they had been apart for eight years, and that the child was his, because Binta was already pregnant when she left the matrimonial home.

The court of first instance decided that custody of the child be given to Ali without deciding the paternity issue.

Binta appealed to the Upper Area Court Jos (against that decision) which reversed the decision of the court of first instance, giving the custody of the child to one Bello, the choice of Binta.

HELD BY THE SHARFAH COURT OF APPEAL:

1. The maxim '*al-Waladu lil firash*' or 'the child belongs to the lawful wedlock' applies here since it appears that Binta could not prove that Umaru has actually divorced her.

b. i. Case Title

Saluhu Na Kabo v. Asma'u K. Maimako PLS/SCA/JSCV/12/77 of 13th January 1978.

ii. Presiding Justices

Alhaji Yahaya Muhammad Kanam – The Grand Kadi

Alhaji Isma'ila Adamu – Kadi

Alhaji Mustapha Muhammad Yola – Kadi

iii. Catchwords

Personal Law – Law of judicial divorce – husband's impotence as a ground for divorce – wife's acquiescence to impotence constitutes a bar – principles of TAHADDUTH – Proof of husband's impotence – Expert opinion on matters of impotence, etc. – Offer by husband to divorce by way of Khul^c payment of Khul^c money.

iv. Headnote

Asma'u sought judicial divorce from her husband, Salihu, on the grounds that he was impotent. The husband denied the allegation on the grounds, inter alia, he had another wife with three children, a fact which Asma'u admitted.

The husband's impotence was not established, but the Upper Area Court decided in favour of Asma'u asserting that the decision was based on the doctrine of 'TAHADUTH, i.e. new rules are made in the light of what is fitting under the prevailing circumstances in a giving society'. Salihu said before the Shari'ah Court of Appeal he would divorce Asma'u if the latter paid back what he had given for her marriage.

HELD BY THE SHARI'AH COURT OF APPEAL:

- 1. The principles of TAHADUTH can only be involved where there is no Quranic text, Sunna or Ijmac governing the point in issue.**
- 2. Where impotence is in issue the judge may not order dissolution of marriage unless the husband is medically certified.**
- 3. Even if the husband's impotence is certified, he should be given respite of one year for treatment as from the date, commencing from the day the proceedings are initiated.**

C. i. Case Title

Halima Alhaji Muhammadu Yahaya v. Alhaji Muhammadu Yahaya – PLS/SCA/CV/10/78 of 22nd June 1978.

ii. *Presiding Justice*

Alhaji Yahaya Muhammadu Kanam – The Grand Kadi
Alhaji Isma'ila Adamu – Kadi
Alhaji Mustapha Yola – Kadi

iii. *Catchwords*

Personal Status – Judicial Divorce – Cruelty and maintenance – methods of proving husband's cruelty witnesses or widespread notoriety.

iv. *Headnote*

Halima sued her husband Alhaji Muhammadu at Area Court Jos, where she requested the said court to dissolve her marriage on the grounds of his failure to maintain her and also on the grounds of his cruelty. On her total failure to prove any of the grounds alleged by her, the Area Court dismissed her case. She then appealed to the Upper Area Court which confirmed the decision of the court below.

Still aggrieved, she appealed to the *Sharī'ah* Court of Appeal, but the latter also dismissed her appeal.

HELD BY THE SHARĪ'AH COURT OF APPEAL:

1. In Islamic Law, the judge must base his decision on the weight of evidence before him.
2. Cruelty to wife can be proved by either the evidence given by witnesses or the facts becoming known generally by the neighbours.

7. CASES FROM SOKOTO STATE SESSIONS OF NORTHERN SHARĪ'AH COURT OF APPEAL

a. i. *Case Title*

Alhaji Isa Bida v. Baiwa Daughter of Alhaji Isa Bida-SCA/NWS/CV/47/70 of 19th March 1971.

ii. *Presiding Justices*

Alhaji Haliru Binji – Deputy Grand Kadi
(Presiding)
Alhaji Abubakar Zaki – Kadi
Alhaji M. Abubakar B. Wali – Kadi

iii. *Catchwords*

Power of Ijbar Father has no power in respect of a daughter he has expressly freed from this power test should be in the bridegroom inflicted with leprosy?

iv. *Headnote*

This is a case in which a father intended to give his daughter to a nephew in marriage. But the mother of the would-be bride protested and got her away. At that juncture, the father told his daughter

to find a suitor of her own choice and he would give her away to the man she chose. The girl then brought to her father, a man called Mamman. At first the father was agreeable; later he refused and alleged that the new suitor was a leper. The new man denied the charge and the lower court was satisfied, so ruled that the girl could go ahead and marry Mamman. The father, again refused and appealed to the S.C.A. Sokoto which dismissed the appeal.

HELD: BY THE SHARFAH COURT OF APPEAL:

1. There can be no right of *Ijbar*, after the father, having considered his daughter to be mature enough to decide things for herself, allowed the daughter to choose a husband.
2. The mere fact that a relative of a suitor was a leper cannot disqualify the suitor who was healthy.
3. A wife is permitted to waive her claim of equality to a husband.
4. A father has not the right to complicate matters where his daughter is trying to get married.

b. i. Case Title

Bello Asrakawa v. Luba – SCA/NWS/CV/336/1971 of 27th July 1977.

ii. Presiding Justices

Alhaji Haliru Binji – Deputy Grand Kadi (Presiding)
Alhaji Hamza Muhammed – Kadi

iii. Catchwords

Divorce Law – Contigent

iv. Headnote

In an action to establish her *Talaq*, Respondent sued Appellant before Sokoto Upper Area Court alleging that he agreed at first to allow her to go to Hajj in company of her father but after preparation he changed his mind, withdrew consent and threatened that if she attempted to go on Hajj she would cease to be his wife.

Since appellant has already made a *Talaq* suspended upon a condition which was satisfied because she made the journey to Mecca, she did not go to the matrimonial home since the marriage ceased to exist.

Respondent sued Appellant before Sokoto Upper Area Court.

Appellant denied the allegations, but Respondent was able to produce the necessary evidence to establish her claim. Accordingly the Upper Area Court gave judgement in favour of Respondent by dissolving their marriage.

Appellant appealed from this decision to the *Sharī'ah* Court of Appeal on the grounds that the Upper Area Court failed to make the necessary investigations into the matter.

HELD BY THE SHARĪ'AH COURT OF APPEAL

1. A contingent *Talaq* suspended until a specified event takes place; if that is obligatory and is likely to happen the court will dissolve the marriage.
2. If a husband says to his wife, 'there is no marriage - between me and you,' he is tantamount to a triple *Talaq*.

APPENDIX VII

IN THE COURT OF APPEAL KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA ON WEDNESDAY THE 11TH DAY OF
DECEMBER, 1985
BEFORE THEIR LORDSHIPS

<u>ABUBAKAR BASHIR WALI, OFR</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>UTHMAN MOHAMMED</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>UMARU MAIDAMA</u>	<u>JUSTICE, COURT OF APPEAL</u>

BETWEEN:

CA/K/80s/85

1. KARINAYU YAKUBU

2. ALHAJI K. NDATSU APPELLANTS
AND

1. ALHAJI YAKUBU TAFIDA PAIKO

2. ALHAJI UMARU GWAGWADA RESPONDENTS

JUDGEMENT

(Delivered by Uthman Mohammed, JCA)

This appeal concerns the exercise of power by a father to impose marriage on his marriageable daughter under Islamic Law of Marriage. The appeal also touches on the constitutional right to fair hearing.

The facts of the case are interesting and I shall state the same in the following narrative:

The 1st Appellant, Karimatu Yakubu, is a nineteen-year old daughter of the 1st Respondent, Alhaji Yakubu Tafida Paiko. There were three suitors who wanted her hand in marriage. The three suitors were (1) Aminu Shuaibu, (2) Alhaji Umoru Gwagwada (the 2nd Respondent in this appeal), and (3) Alhaji Mahmoud Ndatsu (the 2nd Appellant). The father succeeded in talking her against any contact with Aminu Shuaibu, the first suitor. It was then left for her to choose between the second and the third suitors. She was reported as saying that she was agreeable to marry Alhaji Umaru Gwagwada. The 1st Respondent told the trial Area Court that he did not know Alhaji Umaru Gwagwada before this issue arose, and that he personally wanted his daughter to marry Alhaji Mahmoud Ndatsu, because he had earlier permitted him to be courting her with a view to winning her over.

When she chose the 2nd Respondent, the 1st Respondent sent a message to the 2nd Appellant telling him that what he hoped to materialise, Allah had not wished it that way. Thereafter a ceremony of betrothal was conducted between Karimatu and Alhaji Gwagwada.

Despite her betrothal to the 2nd Respondent, the 1st Appellant did not stop meeting the 2nd Appellant, Alhaji Ndatsu. Those contacts culminated in the 1st Appellant writing to the 1st Respondent to tell him that she no longer wanted to marry the 2nd Respondent, Alhaji Umoru Gwagwada. She then wrote another letter to her uncle, in which she explained to him why she had to change her mind about the 2nd Respondent. In the letter she expressed what was in her mind about the whole affair. I reproduce the letter from the judgement of the court. It is as follows:

As usual,
7/7/1984

Dear Uncle,

With all greeting and respect, how are you with the work? I hope the people at home are quite well.

The reason of my letter to you is that, I pledge for apology for all that have happened yesterday between me and my father (Mallam). I also pledge for apology and his forgiveness. I did not intend that my letter to the (Grand Kadi) would affect him. And, he believe, nobody advises me to write that letter to him. The reason of my letter to the (Grand Kadi) is to seek a moral advice so as to avoid doing something wrong and contrary to Islamic rules. The reason why I say I don't like the man now is that since they talked of betrothal and I agree and did not rejected (sic), but later on why I say I don't like the man is since the time of betrothal, he has not come back to me, but only sent people. Indeed, I don't like his manner, and I have been writing the father (Mallam) for this issue, but he said I should not write him again for this issue. In fact, I don't like his manner, and he refused to come since the betrothal was conducted, he always sends people only. For God sake (sic), how can you wish me to marry such (a) person, I objected to the marriage.

My observation is that there is no way that such marriage could last. And I don't intend for such temporary co-habitation which will force me out again. I don't intend to break my marriage for ever.

The parents to consider this situation even before the actual marriage is conducted, for he has not been coming less (sic) to say if the marriage is conducted for him and he does not take necessary consideration and I feel to marry forever as my parents do.

These are the reasons why I don't like him. I therefore beg you to forgive me and you should for God's sake and his Holy Prophet be patient and forgive me for this issue of marriage to this man, and he should leave me to chose my husband for Allah's sake. They should take note that it is important to allow the girl to know the type of the person to marry her before the marriage is concluded. So I would like you to leave me to choose the person of my own choice for marriage as the case of all my sisters. And I prefer to chose the person my mind accepts for peaceful living. I know the father was annoyed highly yesterday for all what he said. But I beg him to forgive me for God's sake and His Holy Prophet. Yet I am much surprised to hear when he (U. Gwagwada) said it was my mother who advised me to write the (Grand Kadi). And I will not do anything to annoy my mother and father forever, less (sic) to say that all these problems occurred because of me. Certainly, I know I come to the world and met them together, why should I separate them? I should never like anything to separate them. I beg you for God's sake and his Holy Prophet for the two to forgive me for all that happened yesterday, nobody knew that I wrote to the father except myself. So, I beg them to forgive me for God's sake together with you all.

That's all I have to say. Happy rest. Yours daughter, Karimatu. I beg my father to forgive me and not to kick me out from his children. I know I have no other father in this world and hereafter except him. Therefore, he should forgive me for God's sake and his Holy Prophet Muhammed (S.I.W.) forever, I know no body besides him as my father.

Yours daughter
Karimatu Y. Paiko.

The 1st Appellant protested against the ceremony of betrothal. But the 1st Respondent told them that betrothal ceremony did not amount to solemnising the marriage. The 1st Appellant further contacted several people in order to stop the 1st Respondent from going ahead with solemnising and conducting the marriage ceremony with the 2nd Respondent.

Those contacted included the Grand Kadi of Niger State, the Upper Area Court Judge, Minna, the Sultan of Sokoto and the Emir of Minna.

It was when she was away to seek the intervention of the Sultan that the 1st Respondent conducted the marriage ceremony and gave her away to the 2nd Respondent. On her return from Sokoto and learning what the 1st Respondent had done, she went straight to the Area Court and filed a petition seeking for the dissolution of the said marriage because it was conducted against her consent. She was successful at the Minna Area Court where her marriage to the 2nd Respondent was dissolved. The 2nd Respondent appealed to the Upper Area Court Minna. He was not successful in his appeal and the Upper Area Court Judge directed that the 1st Appellant be married to the person of her choice. She has since been married to the 2nd Appellant by the Emir of Minna and the marriage has been consummated.

The 1st Respondent then further appealed to the *Shari'ah* Court of Appeal Minna. In the *Shari'ah* Court of Appeal, Alhaji Gwagwada was made the 2nd Appellant and Karimatu and her new husband were made first and second respondents respectively. The *Shari'ah* Court of Appeal fixed a date for hearing. On the adjourned date a legal practitioner, Abdurrahman Gimba presented himself before the court as representing the Respondents/Appellants. The learned Kadis of the *Shari'ah* Court of Appeal challenged the lawyer and the following dialogue ensued:

'Court/Lawyer: What is your name?

Lawyer: My name is Abdurrahman Hassan Gimba.

Court/Lawyer: What is your complaint?

Lawyer: I come to represent Karimatu and Mahmoud Ndatsu.

Court/Lawyer: This is *Shari'ah* Court, and we follow the rules and regulations of Islamic Law in our trials. You have appeared together with the respondents; on what *Shari'ah* rules and regulations did you follow for your representation before this court?

Lawyer: I appear to represent them in accordance with section 33(2) (a) of the 1979 Constitution of Nigeria.

Court/Lawyer: Abdurrahman, we have known that, but as we have already informed you, Islamic Law has its rules for legal representation which is in accordance with *Shari'ah*. So what rules and regulations or authority have you for representing the respondents? Whereas the parties are here competent before us. If you can explain

to us, your authority or rules for your appearance, then the court will consider it. If the court is satisfied, you will be allowed to represent the respondents *per se*. But if we are not satisfied, you will be asked to leave.

Lawyer: I rely on 1979 Constitution. But if this court feels that I did not follow *Shari'ah* rules, then I pray the court to adjourn for two days.

Court/Lawyer: Having known that *Shari'ah* Law permits representation, it means that there is nothing contrary to the 1979 Constitution in this case. Your problem is lack of knowledge in *Shari'ah* rules and regulation in respect of legal representation.

'Moreover, it will be just to tell us such rules in *Shari'ah*, since Islamic Law Books are there, even before us now, yet you can go to our library to find them out. Therefore, since your representation is not established, you are regarded as if you did not come to the court. You have no right to comment over the trial nor have you any chance to seek adjournment. But in future, when you are ready and finally prepared with rules and principles, and also accepted by the court in accordance with *Shari'ah*, we will consider that for necessary action. Besides that, and in respect of these parties before us, you are not allowed to say anything in this trial. Since you have said and informed this court that you don't know *Shari'ah* rules, you are asked to leave accordingly.

The lawyer left and the proceedings continued. The father argued three grounds of appeal. The first ground was that the Area Court No.2 Minna and the Upper Area Court had disallowed him to exercise the power of *Ijbar* (the power of compelling a virgining daughter to a marriage without her consent). On the second ground the father submitted that the 1st appellant had consented to marry Alhaji Gwagwada and that a betrothal ceremony had since been performed, and on the third ground the father averred that the Upper Area Court Judge, Alhaji Ndaliman, had not given the 1st Respondent permission to present his ...case during the hearing before the Upper Area Court.

The second Appellant was also allowed to file and argue two grounds of appeal. They were no grounds at all, but statement of his case before the Area Court and the Upper Area Court. Both the father and Alhaji Tafida Paiko and Alhaji Umoru Gwagwada made their submissions in support of their respective grounds of appeal. The *Shari'ah* Court of Appeal

considered these submissions and came out with a finding that under the strict interpretation of the Law under Maliki School, a father has the right to marry his virgin daughter without seeking her consent, irrespective of her age; but if he wishes he may consult her. The court found that the father had rightly exercised his power of compulsion and had illegally married the 1st Appellant to the 2nd Respondent. That marriage still subsists and the subsequent marriage of the 1st appellant to the 2nd Appellant was held to be void. The *Shari'ah* Court of Appeal then declared the marriage between the 1st Appellant and 2nd Appellant void and ordered the 1st Appellant to leave the residence of the 2nd Appellant Alhaji Ndatsu and return to her father's house (i.e. 1st Respondent). She was also directed to observe the *istibra* period (three menstrual periods). On completion of the *istibra* she would be joined to her rightful husband, Alhaji Umaru Gwagwada, i.e. the 2nd Respondent.

It is against the said judgement of the *Shari'ah* Court of Appeal that this appeal has been filed and argued before us. The learned counsel for the appellants, Abdurrahman Gimba, filed eight grounds of appeal, supported by brief of arguments. The grounds and their particulars ran into some ten foolscap pages. The particulars are by themselves enough to stand as brief of argument of the appellants. I shall summarise their contents in the following exposition.

Grounds one and two are based on the refusal of the *Shari'ah* Court of Appeal to permit one or more legal practitioners to represent the appellants during the consideration of the appeal. The two grounds question the right of the *Shari'ah* Court of Appeal to lay conditions which a legal practitioner must satisfy under Islamic Law before he is allowed appearance before it. It was also submitted by the counsel to the appellants that the *Shari'ah* Court of Appeal was in error to determine the issue of legal representation when the same was not a ground of appeal before it.

I shall deal with the issue of legal representation first. It is difficult from the judgement of the *Shari'ah* Court of Appeal to know what the Kadis of *Shari'ah* Court of Appeal alone really decided in respect of legal representation in the *Shari'ah* and Area Courts. I have reproduced the dialogue which the *Shari'ah* Court entered with the counsel for the appellants when he presented himself as representing his clients. Did the court give the counsel two days adjournment as he requested? It seems in the record that such an adjournment was not granted. Now, how did the Kadis come to the conclusion that the counsel had admitted before them that he did not know

the rules of the *Shari'ah*? What has been recorded, as I have reproduced in the dialogue, was that the counsel was asked if he knew that Islamic Law had its rules as regards legal representation. He was also asked to explain his authority and rules governing his appearance before them. Abdurrahman Gimba answered that he relied on the 1979 Constitution. He went on further and said:

But if this court feels that I did not follow *Shari'ah* rules, then I pray the court to adjourn for two days.

The court snapped in and said that he did not know the rules governing legal representation before the *Shari'ah* Court of Appeal and that since he is ignorant of the said rules, he had no right to comment over the trial. After some further observations the court ended up with the following finding:

since you have said and informed this court that you don't know *Shari'ah* rules, you are asked to leave accordingly.

The above finding is explicit in that the legal practitioner had been told to leave the court and therefore disallowed to represent his clients during the hearing of their appeal. The court in its judgement confirmed its order against the practitioner in the following words:

The lawyer, who stood for Karimath, Respondent No. 1 has declared before the court that he did not know the rules and procedure of Islamic Law relating to legal representation and he has not known the legal requirements for such representation least to explain himself so as to be accepted by this court as to whether his representation of Karimatu is genuine and in accordance with the *Shari'ah* rules; however, even if the lawyer knew such rules and regulations for the representation, since he is not one of the category of persons specified under *Shari'ah* Court of Appeal Law as contained under section 20 of the law, this Court has no ground to accept the lawyer (Abdurrahman Hassan Gimba) who intended to represent Karimatu, Respondent No. 1. Therefore, we advised him to leave.

The important question to ask is, 'Is the *Shari'ah* Court of Appeal constitutionally right to exclude a legal practitioner from representing a party before it?' The learned counsel who represented the respondents before us, Mr M.A. Oredola, addressed us fully on this subject. He conceded that the *Shari'ah* Court of Appeal was in error to exclude the counsel for the Appellant from representing his clients during the determination of the Respondent's appeal before the learned Kadis. Mr Oredola referred to the provision of S.33(13)(a) of the 1979 constitution and submitted that no court is allowed

to exclude any legal practitioner from its proceedings whether criminal or civil.

The provisions of the Constitution in respect of the right of any person being tried of a criminal offence to defend himself in person, or by a legal practitioner of his own choice is clearly expressed in the Constitution (see s.33(4)(b)(c) of the 1979 Constitution). From the inception of this Constitution therefore, all courts, including the Area Courts and Customary courts, have been permitting legal practitioners to appear before them and represent persons charged with criminal offences. It has not been so when such courts are involved in civil trials or determination of civil appeals. The *Shari'ah* Courts of Appeal, being courts concerned only with civil appeals, have been barring counsel from appearing before such courts to represent those who seek their services. I shall endeavour in this judgement, to show that under the Constitution, even in civil trials or appeals, no court or tribunal in this country has the power to exclude a legal practitioner from representing any person before it. I will first refer to the provision of S.33(1) of the Constitution which provides:

33(1) In the determination of civil rights and obligations, including any question or determination by or against any government or authority a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.

This section opens with reference to a party's *Civil rights and obligations*. Now under subsection 13 of section 22 it has been provided that:

The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in sub-section (1) and (4) of this section (including the announcement of decisions of the court or tribunal shall be in public:

Provided that-

- a. A court or such a tribunal may exclude from its proceedings persons *other than parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of 18 years, the protection of the private lives of the parties to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of Justice'* (underlining is mine).

Under the foregoing provisions of the constitution it is a clear direction that whenever a court is dealing with civil as well as criminal matters it cannot exclude from its proceedings parties or their legal representatives. *In other words, the intention of the legislature here is so clear that once a legal practitioner presents himself before any court or tribunal established under the law representing a party involved or interested in the proceedings in such proceedings.* It is a party's right to be represented by a legal practitioner of his choice and who has satisfied the requirements of Legal Practitioners Act 1962 and has been properly enrolled by the Council of Legal Education as a legal practitioner. As rightly pointed out by the learned counsel for the appellants in his brief, that since the proviso to S.22(5) (e) of 1963 Constitution had been omitted from the 1979 Constitution, it shows a positive desire on the part of the legislature to allow legal representation in all courts. S.22(5)(c) supra was the enabling provision that legalised the existence of S.20 of the *Shari'ah* Court of Appeal law which prohibited appearance of legal practitioners in the *Shari'ah* Courts of Appeal.

S.22 (5) (e) provides as follows:

22(5) Every person who is charged with a criminal offence shall be entitled:

- a. to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence:

Provided that nothing in this subsection shall invalidate any law by reason only that the law prohibits legal representation in a court established by or under the Native Courts Laws, 1958, the *Shari'ah* Courts of Appeal Law 1960, or the Court of Resolution Law, 1960, of Northern Nigeria (a) the Customary Courts Law, 1956, of Eastern Nigeria (b) or the Customary Courts Law of Western Nigeria (c) as amended, or any law replacing those laws.

While S.20(1)(a) and (b) of the *Shari'ah* Court of Appeal Law enacted thus:-

20(1) No legal practitioner may appear to act for or assist any party before the court.

2. In any proceedings before it the court may permit the appearance on behalf of any party to such proceedings of-

- a. the husband, wife, guardian, servant master or any inmate of the household of any party, who

- shall give satisfactory proof that he or she has authority in that behalf; or
- b. a relative of any person who is interested in the administration of the estate of a person who was subject to the jurisdiction of a native court.

The 1963 Constitution was repealed by the 1979 Constitution and save to the extent some of the provisions of the former have been re-enacted in the latter, it has ceased to be an existing law and since the proviso to S.22 (5)(e) was not re-enacted into the 1979 Constitution to give S.20(1) of the *Shari'ah* Court of Appeal Law a legal support, S.274(1) of the 1979 Constitution cannot apply to save it as an existing law. See *F.S. Uwai for v. The Attorney General of Bendel State & 4 ors.* (1982) 7 S.C. 124, particularly at 209 in which Idigbe JSC when considering S.274(1) on the matter concerning 'existing Law' said:

The way I read a section 274(1) is this: an existing law, i.e. an unrepealed enactment still on record in our statute books cannot have effect as, or be deemed to be, a law of the National Assembly or a House of Assembly unless it can be modified in such a way 'as to bring it into conformity' with the 1979 Constitution.'

I am afraid to say that it will be manifestly wrong to regard the said law as an existing law in view of the fact that the legislature does not permit a court to exclude a legal practitioner from appearing in any proceedings under the 1979 Constitution. To buttress this argument further, I refer to the provisions of s.22(3) (a) of 1963 Constitution. This section is almost in *pare material* with S.33(13)(1) of 1979 Constitution, except for the commission of Legal Practitioner in S.22(3)(a) of 1963 Constitution. I shall reproduce the section for easy comparison. It is as follows:

S.22(1) In the determination of his Civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

3. The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public:

Provided that –

- a. A court or such a tribunal may exclude from its proceedings persons other than the parties thereto

in the interest of defence, public safety, public order, public morality ...’

It could be seen in this provision that the legislature deliberately omitted to mention ‘legal practitioners’ as it did in the 1979 Constitution. It goes without saying therefore, that the exclusion of ‘legal practitioner’ was deliberate in the 1963 Constitution, because there were statutory enactments elsewhere recognised by the Constitutions, e.g. S.22(5)(e) which prohibited legal representation in some category of courts. But in the 1979 Constitution no such provision was made. I am further strengthened in my opinion that by this deliberate omission, S.20(1) of the *Shari’ah* Court of Appeal Law, as well as all other similar provisions could not be regarded as existing laws. Under S.1(3) of the 1979 Constitution it has been provided that: ‘If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other laws shall to the extent of the inconsistency be void’. It is my view that S.20 of the *Shari’ah* Courts of Appeal Law in so far as it prohibits legal representation by a qualified legal practitioner, is void.

The *Shari’ah* Courts of Appeal, in its judgement, gave reasons for its exclusion of counsel for the appellants. The court said that the lawyer did not know the rules and procedures of Islamic Law requirements for legal representation, least to explain himself so as to be accepted by the court as regards his representation of Karimatu Yakubu. But the learned Kadis however have failed to explain what they meant by *Shari’ah* rules as to the legal representation. If they interpret legal representation to embrace appearance of lawyers in their courts, *I will say that there is no such separate arrangement made by any statutory law for lawyers appearing before the Shari’ah Courts of Appeal.* To emphasise what I have said earlier in this judgement, that once a lawyer has been enrolled to practise in Nigeria by the Council of Legal Education, no court shall put an additional qualification on him as a prerequisite to his appearance before it. This is the current position under the Constitution and other valid and subsisting statutory enactments. Any other additional requirements or practice, as far as legal representation is concerned, must be within the provision of the Legal Practitioners Act, 1962. The *Shari’ah* Courts of Appeal, Minna, was in error to exclude a legal practitioner from appearing before it to represent a party’s interest. The learned Kadis are also wrong to say that there could not be plurality of legal representation in their courts. Any number of lawyers could appear and represent litigants in

any court or tribunal established under the constitution or any other law.

The learned Kadis referred to the text of *Mawahibul-Jalil Li Sharhi Mukhtasar Khalil*, Vol., 5, pages 182 – 183 where it says:

It is not allowed for any man or woman to have more than one person for legal representation to represent him/her in any case, nor is he/she allowed representation by two or more persons.

The concept of representation referred to in the text reproduced above is not the same as legal representation provided for under the Legal Practitioners Act 1962. *In any event the Islamic provision is not strictly for legal representation.* Such a representation is nothing more than *an agent* and who should represent a party in an action. He is further controlled by certain conditions which when explained in fuller detail would show that it is a typical agent principal's relationship. See *Ruxton on Maliki Law, page 201 in the chapter on Agency*. It is not even correct as the learned Kadis have expounded in their judgement to say that it is completely prohibited to have two or more representatives in any action. In the book of *Bahjah*, Vol. I page 207 it is provided as follows:

It is not allowed for any man or woman to have more than one representative (I will not call him legal because the law does not say so) in any action except in matters concerning trade (buying and selling) or other litigations.

In this text it is provided that if a particular litigation requires multiplicity of representation it is permissible.

In conclusion I hold the view that the action of the learned Kadis in excluding a legal practitioner from representing the appellants in their court, is a violation of the appellants' fundamental rights to fair hearing. It is an infringement of the Constitutional provisions which has rendered the proceedings and judgement null and void.

The grounds of appeal which I have so far discussed and dealt with are sufficient to dispose of this appeal. But in case I am found to be wrong in my conclusions on the foregoing grounds, *I shall proceed to consider the other remaining grounds which are essentially of mixed Islamic Law and facts.* In a nutshell, these grounds cover that there is no provision under Islamic Law of marriage which confers on the father the absolute right to compel his virgin daughter in marriage without her consent. This is the cardinal point of Islamic Law raised in this appeal. There are many authorities referred to by all the three lower courts on this point. Learned counsel who appeared, and particularly learned counsel for the respondents helped this

court tremendously with relevant authorities on this point. *One conclusion on which there is a consensus of opinion in the Maliki School of Law* is that a father has a right to compel his virgin daughter in marriage without her consent and even if she has attained puberty, but if he consults her that would be most desirable. This is the view of the RISALAH which provides:

A father has the right to give his virgin daughter in marriage without her consent even if she has attained puberty, but he may consult her if he so wishes.

Also in Bahjah, Vol.1 page 208 it has been provided that it is desirous for the father to consult his daughter, if she reaches the age of puberty (generally accepted to be 14 years) in order to find out whether she is agreeable to the marriage. The consultation is regarded under the Law of Marriage as a rewarding exercise. This extract provides as follows:

It is desirable for a father to seek the consent of his daughter who has attained puberty when he is giving her out in marriage. Such consultation should be through a person the girl does not feel shy of.

Even this general principle is subject to further interpretation as would appear later in this judgement.

The learned counsel for the appellants referred to a decided case from the decision of the *Shari'ah* Courts of Appeal, Sokoto. The case was of *Alhaji Isa Bida v. Baiwa the daughter of Alhaji Isa Bida*, Appeal No. SCA/NWS/CV/47/70 delivered on 19th March, 1971 where the *Shari'ah* Courts of Appeal held as follows:

1. There can be no right of *Ijbar*, after the father having considered his daughter to be mature enough to decide things for herself, allowed the daughter to choose a husband.
2. The mere fact that a relative of a suitor had leprosy could not disqualify a suitor who is healthy.
3. A wife is permitted to waive her claim of equality to a husband.
4. A father has the right not to complicate matters where his daughter is trying to get married.

The learned Kadis were referred to this case but throughout their decision they avoided commenting on whether they agree or not with the authority. I find the authority to be very relevant to this case. It was the decision of some of our very learned *Shari'ah* Courts of Appeal judges (Alhaji Haliru Binji, Alhaji Abubakar Zeki and Mallam Abubakar Bashir Wali). The cardinal issue decided in that case was the competence of a father to

compel his virgin daughter in marriage after he had accorded her the privilege of choosing the person she liked to marry.

In the case in hand there were three suitors and the father, after dissuading Karimatu Yakubu from marrying Aminu Shuaibu, permitted the 1st Appellant to choose between the 2nd Respondent and the 2nd Appellant. This shows that he had given her independence to choose the person she liked. Under Islamic Law if a father does that, he has lost the power of *Ijbar*, i.e. compulsion in marriage (see Baiwas case *supra*). There are other authorities referred to by both the Area Court and the Upper Area Court on *Ijbar*. They are mainly authenticated traditions of the Holy Prophet. I will quote one of them.

It was reported from Dan Abbas that one girl came to the Holy Prophet and informed him that her father had married her against her consent and she had rejected it. The Holy Prophet gave her choice, either to accept or reject it.

This tradition is quoted in *Fiqhu Sunna* Vol. II chapter 2 at page 130.

The *Shari'ah* Court of Appeal referred to the effort made by the Area Court Judges in citing authorities to buttress their respective reasoning that the learned judges of the Area Courts have not attained the status of Mujtahid. The learned Kadis explained what they meant by this through the following findings:

So long as a teacher or judge is below the status of a *Mujtahid* (i.e. who is qualified to use independent judgement) it is compulsory for him under Islamic Law to follow the legal interpretation of his school of Islamic jurisprudence with regard to any *Hadith* or verse of the Holy Quran which is related to the decision to be given by him on any case, as we have mentioned earlier.

I tried in vain to find out the authority upon which the learned Kadis based their decision as reproduced above. What criteria did the learned Kadis follow to establish that the two Area Court Judges are not adequately qualified to use their independent judgement to interpret the law which they are supposed to apply? It would be a negative approach to the rules governing the practice in Area Courts to say that an Area Court Judge cannot establish an authority in support of his judgement, through reference to Quran and *Hadith*. In my view Islamic law is not a static law. It is a living law, subject to interpretation, like any *other law to suit all times and circumstances*. All the commentaries being referred to daily by judges, i.e. Risalah, Mukhtasar, Tuhfa and other deductions

made by earlier Muftis, Judges and learned authors which they did by using the power of analogy, are recognised authorities in the interpretation of the law, and are in fact one of the sources of Islamic Law. Any person appointed to adjudicate under Islamic Law is required and deemed to know the Law and to apply it. In its application if the Judge has erred it is for a higher authority to correct such an error. A *Mujtahid* is a founder of a school of law. If only those people could interpret Islamic Law, how could the courts adjudicate? To show the extent of the flexibility of the Law, on some topics, jurists belonging to same school have expressed different opinions and those opinions are regarded as good and valid interpretation of the Law on the topic.

I say it with authority that the Hadith of the Holy Prophet is a Law by itself and it must be obeyed. I refer to the book of *Hidaya Al-Tullab*, written by the most learned Sheik Uthman bn Fodio, page 1. In this very useful book, the learned Sheik outlined ten points as guidance in the application of Islamic Law. The first is:

The first guidance is that any legal decision obtained from the Holy Prophet shall not be attributed to any school of law. It is a law by itself and it is obligatory on all Muslims to work with it. And it is obligatory also to act in accordance with the injunction made therein by the Holy Prophet.

The *Hadith* I quoted earlier in this judgement is one of the Traditions of the Holy Prophet, cited by the Area Court Judge who tried this case. The learned Kadis are in error to say that the *Hadith* could not be used by the Area Court Judge because he is not a *Mujtahid*. This is a wrong approach to the rule of interpretation. I think it would have been relevant if the learned Kadis established, through references to authorities, that the opinion in the *Hadith* is 'weak' or that its authority is in doubt or that the interpretation of its meaning is wrong. But to say that judges could not refer to other authorities because they are *Mugallids* is a misapplication of the rule of interpretation of Islamic Law. *Judges could refer to authorities even in other schools where our Maliki School is silent on a given problem.* See *Hidaya al-Tullab* of Sheik Uthman Bn Fodio, the 8th guidance at page 4. I had occasion once to refer to it when I was a High Court Judge in Sokoto in the case of *Tela Rijiya Dorawa v. Hassan Daudu* (1975) NNLR page 87. I find it pertinent to refer to it again in this judgement. The learned Sheik Uthman bn Fodio said as follows:

It is obligatory upon every adult Muslim to believe that all the founders of Islamic schools had divine guidance ... It is also compulsory upon every adult Muslim not to stop himself from acting and working in accordance with their (Founders of Islamic Schools) opinion. Some people nowadays used to remark as follows:

“We follow the opinion of so and so through necessity only.”

They say this whenever occasion makes them adhere to a learned opinion from a different Islamic School other than the one they follow. They seem to regard this practice as an act of sin. But their assumption (that they have committed a sin) is in fact the sin itself and they must repent from the same.

On this ground of appeal I am of the considered view that the father had lost his power of *Ijbar* when he allowed his daughter to choose a husband among her suitors. Having lost the said power the father was without authority to order for the solemnisation of the marriage between the 1st Appellant and the 2nd Respondent.

One other ground of appeal which touches also on the issue of fundamental right of fair hearing is the submission of the learned counsel for the Appellants that *the Grand Kadi had taken part in an attempt to reconcile the parties* outside the court, and could not therefore be justified for him the Grand Kadi, to participate in the determination of the appeal. Mr Oredola, learned counsel for the respondents, submitted that there was nothing wrong in attempting to reconcile the parties outside the court and referred to the case of *Ikani Olue and Ors vs. Obi Enewali and Ors* (1972) 2 SC 23. Learned counsel further submitted that even if the act of the Grand Kadi was objectionable the appellant had waived it by permitting the Grand Kadi and Kado Yunusa Kenchi to take part in the proceedings without any challenge. Counsel then said that all those contacts were made by the 1st Appellant and she should not be permitted to benefit from the chain of events which she set in motion. I agree with Mr Oredola that the parties should have objected to the participation of the Grand Kadi and Kadi Yunusa Kenchi, if there was any fear that any of the two Kadis would be biased in their determination of the appeal. I have looked carefully in the record and the only point to support this assertion was a casual reference by the 1st Respondent that the matter had reached the Upper Area Court Judge and Grand Kadi. It is not clear as to what they really did and I think when the 1st Appellant said in her letter that she wrote asking for some advice from the Grand Kadi, this should not

be allowed to be made an issue after the Grand Kadi had eventually presided over the appeal, concerning the marriage. This ground fails.

In conclusion, this appeal shall be allowed on the following grounds:

Firstly, the exclusion by the *Shari'ah* Courts of Appeal of the legal practitioner representing the appellants from taking part in its proceedings is a serious violation of the provisions of the 1979 Constitution. Its decision and judgement is therefore a nullity.

Secondary, where a father has given his virgin daughter the right to choose between her two or more suitors he has lost his power of *Ijbar* and any marriage contracted without her consent is invalid. Consequently the marriage of the 1st Appellant to the 2nd Respondent by the 1st Respondent is void.

The judgement of the *Shari'ah* Court of Appeal, Minna, delivered on the 23rd May 1985 is set aside and the judgements of the Area Courts are restored. The marriage of Karimatu to Alhaji Umaru Gwagwada stands dissolved. The marriage solemnised between Karimatu Yakubu and Alhaji Mahmoud Ndatsu remains valid. The appellants are entitled to the costs of this appeal which I assess at ₦500.00 in this Court and ₦200.00 in the court below.

(Uthman Mohammed)
Justice, Court of Appeal,

A.H. GIMBA for the Appellants.

M.A. OREDOLA, (A.K. OWOLABI) with him, for the Respondents.

IN THE COURT OF APPEAL
KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
ON WEDNESDAY THE 11TH DAY OF DECEMBER, 1985
BEFORE THEIR LORDSHIPS

<u>ABUBAKAR BASHIR WALI CFR</u>	<u>JUSTICE COURT OF APPEAL</u>
<u>UTHMAN MOHAMMED</u>	<u>JUSTICE COURT OF APPEAL</u>
<u>UMARU MAIDAMA</u>	<u>JUSTICE COURT OF APPEAL</u>
	<u>CA/K/80s/85</u>

BETWEEN

1. KARIMATU YAKUBU
 2. ALHAJI MAIMOUD NDATSU APPELLANTS
- AND**
1. ALHAJI YAKUBU TAFIDA PAIKO RESPONDENTS
 2. ALHAJI UMARU GWAGWADA

JUDGEMENT
(Delivered by A.B. Wali CFR JCA)

I had a preview of the lead judgement of my learned brother Mohammed JCA and for the same reasons stated therein by him. I too will allow this appeal.

The facts involved in the case now on appeal before this court, have been fully stated in the lead judgement of my learned brother and need no further repetition by me. Before this court two issues all of law were raised and canvassed, and these are:

1. Constitutional right of a legal practitioner, qualified under the Legal Practitioner Act, 1962 to appear and practise before a *Shari'ah* Court of Appeal.
2. The extent to which a father can compel his virgin daughter who has attained the age of puberty (usually 15 years) and after he had given her right to choose a husband amongst her suitors to marry another person other than her choice.

These two issues have been thoroughly tackled in the judgement and I only wish to add by way of emphasis *that Islamic Law, like Islamic Religion is for all people at all times regardless of their advancement in modern technology. The law is not meant to be static or dogmatic.* It has in fact developed through the interpretation of the general principles laid in the Holy Koran and the Traditions of the Prophet Mohammed (Peace

and blessing of Allah be with him). The Holy Prophet (Peace and blessing of Allah be with him) is reported to have said 'difference of opinion among my people is a blessing'. The present well known and accepted 4 Sunnai Schools that is, *Hanafi, Maliki Shafii and Hambali, came into being as a result of difference of opinion expressed through the interpretations of principles of law in the Holy Koran and the Hadith* (i.e. the saying of the Prophet). I think it will be doing great disservice to Islam to restrict any Moslem to the particular School he adheres to in his efforts to find solution to a given legal issue the answer to which he cannot or is unable to trace in his school. A perusal through commentaries written by eminent legal luminaries on Islamic law books, e.g. Khalil-Tuhfa, Risolah, etc. which are enunciated with different opinions of learned jurists from different Schools expressed on a topic, will lend credence to what I have said (supra).

In my own opinion, the learned Kadis of the Area Courts, like any judge of the *Shar'ah* Court of Appeal, have every right, to support their judgements by relying on the text of the Holy Koran or Hadith.

It is settled law as expressed by the *Shar'ah* Court of Appeal in its judgement in *Alhaji Isa Bida v. Baiwa* (the daughter of Alhaji Isa Bida) SCA/NWS/CV/47/70 delivered on 19/3/1971:

There can be no right of *Ijbar* after the father having considered his virgin daughter to be mature enough to decide things for herself allowed the daughter to choose a husband.

Though a decision of a lower court, I find it very sound and I agree with it and equally adopt it.

The 1st Respondent has lost the prerogative power of compelling the 1st Appellant to marry a person other than of her choice, from the moment he gave her the option.

The other point concerns the interpretation of some provisions of the Constitution, and to be able to give the correct interpretation of the subsections of S.33 of the 1979 Constitution one must read them together not in isolation. As correctly shown in the lead judgement, reading S.33(1) together with S.33(13) (a) of the Constitution, it will become glaringly clear that the intention is to afford parties services of legal representation before any court or tribunal, (*Shar'ah* Courts of Appeal and Area Courts, Customary Courts inclusive) even in civil litigations.

The appeal must therefore succeed and it is accordingly allowed. The judgement of the *Shar'ah* Court of Appeal, Minna delivered on 23/5/85 is set aside while the judgements of the Area Court No. 2 Minna which was affirmed by the Upper Area

Court Minna is restored. The marriage solemnised between Karimatu Yakubu and Alhaji Mahmoud Ndatsu remains valid and subsisting.

The appellants are entitled to the costs of this appeal assessed at ₦500.00 and ₦200.00 in the Court below.

**(Sgd.)
A.B.Wali CFR
Justice Court of
Appeal,**

A.H. GIMBA for the Appellants.

M.A. OREDOLA, (WITH HIM A.K. OWOLABI) with him, for the Respondents.

IN THE COURT OF APPEAL
KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
ON WEDNESDAY THE 11TH DAY OF DECEMBER, 1985
BEFORE THEIR LORDSHIPS

<u>ABUBAKAR BASHIR WALI CRF</u>	<u>JUSTICE COURT OF APPEAL</u>
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BETWEEN

1. KARIMATU YAKUBU
2. ALHAJI MAIMOUD NDATSU APPELLANTS
AND
3. ALHAJI YAKUBU TAFIDA PAIKO..... RESPONDENTS
4. ALHAJI UMARU GWAGWADA

JUDGMENT
(Delivered by Umaru Maidawa JCA)

I had a privilege of having a preview of the judgement of my learned brother Uthman Mohammed JCA, just delivered on his behalf. In allowing this appeal, I will adopt the reasoning given in the afore-said judgement with cost as already assessed by him.

A.H. GIMBA for the Appellants.

M.A. OREDOLA, (A.A. OWOLABI) with him, for the Respondents.

NB: Most emphasis in the judgements are ours.

Musa Alli Ajetunmobi.

Shari'ah Legal Practice in Nigeria 1956-1983

This book contains an in-depth study of the Shari'ah legal system generally, and its practice in Nigeria in particular in 1956 to 1983. The book relates fully the meaning and scope of the Shari'ah and proceeds to elucidate the general and legal precepts of the Shari'ah: its legal theory and legal practice; the development of Shari'ah legal practice, and Legal History in Nigeria vis-à-vis the Shari'ah legal practice.

The subject-matter of this book is exhaustively examined, with ample, relevant data, in six chapters:

- Introduction covering meaning, scope, general and legal precepts of the Shari'ah; legal theory and legal practice; development of Shari'ah legal practice, etc.
- Historical Sketch of the Shari'ah in Nigeria
- Shari'ah Legal Practice in the Lower Courts
- Shari'ah Legal Practice in the Superior Courts
- Problems and Prospects of Shari'ah Legal Practice in Nigeria
- Conclusion
- Appendices.

Of particular interest to both Muslims and non-Muslims, especially Legal Practitioners, are :

Appendix II – 'Area Courts (Civil Procedure) Rules, 1980, and Appendix VII – 'Summary of Cases in 1980 and 1985 Editions of *Shari'ah* Law Reports; Published by Centre of Islamic Legal Studies, Institute of Administration, Ahmadu Bello University. This section contains reports of legal decisions of several cases from all the grades of the *Shari'ah* Court.

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